Supreme Court, U.S.
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No. _____

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In The

SUPREME COURT OF THE UNITED STATES

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THOMAS W OLICK
PETITIONER

V

JOHN HANCOCK DISTRIBUTORS INC.
RESPONDENT

==========

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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Statement of Issues Presented

1. Was the Appellant required to file a motion to recuse a Judge before he discovered that the judge was secretly negotiating employment with a law firm representing the Respondent (Due Process Clause of the Fourteenth Amendment to the U.S. Constitution)?

2. In conflict with the Federal Arbitration Act (U.S.C. 9, the "FAA"), the NASD's Arbitration Rules and By-Laws (the "NASD's Rules"), a prior Arbitration Panel determination, a prior un-appealed Bankruptcy Court Order, prior Appellate Court orders and the 5th and 14th Amendments of the U. S. Constitution, was it proper to enjoin an arbitration which was being pursued by the Bankruptcy Court's Special Counsel (i.e. opining that the claims are barred because they should have been pursued in the Bankruptcy Court and not through arbitration)?

3. In conflict with the FAA, the NASD's Rules, a prior unappealed District Court final order, and prior Appellate Court orders, was it proper to enjoin an arbitration which is subject to and within the scope of a written arbitration agreement (i.e. opining that the claims should have been brought as cross claims in an unrelated prior litigation)?

4. In conflict with the FAA, the NASD's Rules, the Arbitration Panel's decisions and contemporaneous Appellate Court opinions, did the courts improperly enjoin arbitration

of "malicious prosecution" claims (i.e. opining that no malicious prosecution claims were asserted and ignoring that claims for "malicious prosecution" were properly asserted under that name in the NASD arbitration Statement of Claims)?

5. In conflict with the FAA, the NASD's Rules, the Arbitration Panel's determination, prior Appellate Court decisions on these issues, a prior unappealed Appellate Court order in this dispute, did the court improperly enjoin an arbitration based upon Respondent's defamatory publication of incomplete, inaccurate and false statements, including but not limited to the recasting of customers' complaints and arbitrations awards against the Respondent as if they were against the Appellant (i.e. opining that the issue should have been brought as a cross claim against a co-defendant in an unrelated suit and/or before the defamatory acts occurred and/or were discovered)?

6. In conflict with the FAA, the NASD's Rules, the Appellate Court's unappealed prior orders in this dispute and/or on the subject, did the court improperly determine the merits of Appellant's arbitration claims and Respondent's affirmative defenses?

List of parties

Petitioner:

Thomas W Olick

Respondents:

John Hancock Distributors Inc.
John Hancock Mutual Life Insurance Co.
Larry Carter
Frederick L Reigel, Bankruptcy Trustee

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2) 3rd Circuit Order of 10/16/01 In re Hancock v Olick 00-1047 — app 4

3) Dist Court Order & Memorandum 12/14/98 In re: Hancock v Olick 96-c-4460 — app 5-12

4) Dist. Court Order of 11/26/93 Olick v Nikles (93-c-1495 E.D. Pa) — app 13-20

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6) 3rd Circuit opinion of 8/10/98 In re Hancock v Olick 97-1956 — app 23-42

7) 3rd Circuit order of 9/10/99 In re: Hancock v Olick 98-2178 — app 43-48

8a) 1st District Court order of 6/24/94 in Carroll v Hancock 92-5907 E.D. Pa. — app 49

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13) Bankruptcy Order of 4/19/94 granting Hancock's Motion to lift STAY and prosecute its counterclaims against Olick in NASD 92-04070 app 106

14) 3rd Cir 8/28/01 Opinion in Hancock v Olick 00-1763 opining Olick's malicious prosecution for NASD 92-04070 cold not be made until after September 28, 1995 app 107-111

15) 3rd Cir 8/28/01 Opinion in Hancock v Olick 00-1147 opining that Olick's action for concealment of evidence in NASD 92-04070 should not have been enjoined app 112-118

Petitioner, Thomas W Olick, requests that a writ of certiorari be issued to review the judgment of the U.S. 3rd Circuit Court of Appeals in Case No. 00-1014, In Re: John Hancock v Olick.

Opinions Below

The 3rd Circuit opinion In re Hancock v Olick 00-1047 enjoining NASD 96-01247 (App 1-3). The order denying a Rehearing (App 4). The opinion In re: Hancock v Olick 96-c-4460 enjoing arbitration (App 5-12). Order in Olick v Nikles (93-c-1495 E.D. Pa) remanding the federal dispute to arbitration (App 13-20). The Bnkr. Court Order In Olick 96-22123 appointing Special Counsel for NASD 96-01247 (App 21-22). The 3rd Cir. opinion In re Hancock v Olick 97-1956 re. venue and jurisdiction of arbitrable claims (App 23-42). The 3rd Circuit order In re: Hancock v Olick 98-2178 opining that no malicious prosecution claims were alleged in NASD 96-01247 (App 43-48). The three District Court orders in Carroll v Hancock denying Olick's request to file cross & 3rd party claims (App 49-51). The Statement of Claims NASD 96-01247 containing defamation and malicious prosecution claims (App 52-91). Olick's request for PERMISSION to file cross claims in Carroll v Hancock (App 92-95). Hancock's Brief in opposition to Olick's PERMISSION motion in Carroll v Hancock (App 96-102). Olick's NASD Uniform Application for Securities Registration (App 103-05). 4/19/94 Bnkr Order lifting Stay for Hancock's NASD claims (App 106).

Statement of Jurisdiction

The judgment of the U. S. Appellate Court was entered on 8/28/01. The Request

for a Rehearing was denied on October 16, 2001. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. @1254 (1), 28 U.S.C.A. 2101 (c) and the Supreme Court Rule 10(c).

Constitutional and Statutory Provisions Involved

The 5th and 14th Amendments to the U. S. Constitution provides that: "No person shall ... be deprived of life, liberty or property, without due process in law"

A hearing by an impartial and disinterested tribunal is a basic guarantee contained implicitly in the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

9 U.S.C.A. @ 2 provides that arbitration agreements shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract; @ 3 provides that a court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement; @ 4 authorizes a district court to issue an order compelling arbitration if there has been a failure, neglect or refusal to comply with the arbitration agreement.

NASD Code of Arbitration Rule 3706, Sec. 6 states that: "No party shall, during the arbitration of any matter, prosecute or commence any suit, action or procedure against any other party touching upon any of the matters referred to arbitration pursuant to the Code."

@ Part II 3708, Sec. 8 (a) "Required Submissions ("NASD Submission Rules") provides that:

> "Any dispute, claim or controversy eligible for submission Under Part I of this Code between or among members and/or associated persons, and/or certain others arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) with such member, shall be arbitrated under this Code, at the instance of ... (2) ... a person associated with a member against a member, and; (3) a person associated with a member against a person associated with a member ..."

NASD Rules @ Article IV Sec. 3 (a) provides that Members must provide complete and accurate written notice to the NASD of customer complaints against an associated person and @ 3(b) that the Member must amend those forms within thirty days of learning information that makes the prior notices inaccurate or incomplete.

Pennsylvania Statutes 42 Pa Cons. Stat. Ann. @ 8531 (a)(2) prohibits the filing of a malicious prosecution suit prior to the termination, in his favor, of civil proceeding filed without probable cause and in which he has suffered damages.

Pennsylvania Code of Judicial Conduct @ Cannon 3 C (1) states that: "A judge should disqualify himself in a

proceeding in which his impartiality might reasonably be questioned ..."

Statement of Case

a. New law demanding violation of the FAA

The court issued two self contradictory orders on the issue of where Olick must file claims subject to arbitration agreements. The parties in the two cases were in privity (i.e. employer and its employees). In the first case (Olick v Nikles 93-1495 E.D. Pa), the judge opined Hancock's employee Olick's claims against co-employee Nikles were within the scope of the agreement and must be arbitrated ("Nikles Order") (@ App 13-20).

In the 2nd case (Hancock v Olick 96-4460 E.D. Pa), the court ordered that related claims against Olick's employer, Hancock, were enjoined because they should have been, but were not raised as cross claims in the unrelated Carroll Litigation (App 12). (In that litigation, Hancock opposed Olick's request (App 96-102) to submit cross claims based upon "newly discovered evidence." Hancock alleged "privity" with Nikles, estopple based upon the Nikles Order, the FAA and that the claims weren't related to Carroll's claims. This second order suggested that Olick should have breached the arbitration agreement, violated the FAA and NASD Rules by filing his claims in the Carroll Litigation. Because he failed to that, the court opined that his claims were res judicata.

Thus, the courts have placed a new duty upon litigants to violate the FAA and to breach arbitration agreements.

b. Creation of new law requiring that a motion to recuse a judge must be filed before facts are discovered.

As noted above, two diametrically opposed opinions were issued by the same judge in related actions. After issuing his second opinion, the judge retired and announced that he was taking a position with a law firm. It was later discovered that the firm represents Hancock. Olick sought to have the order rescinded because of the judge's secret employment negotiations during the litigation could have prejudiced him as demonstrated by the contradictory orders.

The Appellate court opined (App 2) that, because Olick did not raise this issue in the district court (i.e. before he discovered the judge's conflict of interest), he had waived the right to raise that issue on appeal. This ruling is an open invitation to misconduct and rewards the improper concealing of material information. That ruling undermines the court's impartiality.

c. Failure to provide due process by reversing the bankruptcy court's orders without an appeal and without a hearing, undermining the bankruptcy court's ability to manage the estate's affairs and prevented Olick from adjudicating his claims in any forum.

The court opined that one of Olick's malicious prosecution claims was barred because it should have been brought in his bankruptcy and not through arbitration (3rd Cir 00-1147, App 116). Bankruptcy special counsel was prosecuting the estate's claims in the arbitration.

Hancock had opposed the appointment of special counsel and the arbitration of the disputes. After a hearing, the bankruptcy court appointed special counsel (App 21). Hancock did not file an appeal. Thus, the issue of the proper forum became res judicata.

No party alleged in their briefs that those claims should have been heard in the bankruptcy court. The court had no reasonable basis to overturn the bankruptcy court's order without a hearing on the issue. The bankruptcy court's final order prevented both Olick and Hancock from raising those disputes in the bankruptcy proceeding.

Thus, the court denied Olick due process and prevented him from litigating the dispute in any forum. The court did not opine, de novo, that the bankruptcy court's order should be reversed.

d. The orders conflicts with prior Appellate decisions in this dispute.

The 3rd Circuit previous opined in Hancock v Olick, 97-1956 (App 23-42), that claims not decided in a prior federal court suit must be arbitrated. Hancock did not appeal that order.

Prior to the entry of that opinion, Hancock raised the issue of res judicata in the 96 Arbitration. Hancock alleged that Olick's claims were barred because they should have been but were not raised in the Carroll litigation or in NASD 92-04070. The Arbitration Panel denied Hancock's res judicata defense. Hancock didn't appeal.

The Appellate court also issued a contemporaneous opinion in Hancock v Olick, 00-1763 (App 107), stating that

Olick's malicious prosecution claims were not barred because he could not have filed suit prior to a final order in NASD 92-04070 which denied Hancock's indemnity claims. Again, Hancock did not appeal.

Olick's two malicious prosecution claims were subject to an arbitration agreement (App 105 @ 5). Because the bankruptcy court properly remanded those disputes to arbitration, they could not have been litigated elsewhere. The order barring Olick's bankruptcy malicious prosecution claim conflicts with the prior unappealed bankruptcy court orders.

e. The court's orders improperly ruled upon the merits of arbitrable claims, i.e. based upon "newly discovered evidence" and/or newly published defamatory statements.

1. Anonymous customer complaint

In 1996, Hancock revealed for the first time that it had published a report of an "anonymous" customer complaint after it had determined four years earlier that no anonymous customer existed. NASD Rules @ Article IV @ 3-a requires complete and accurate reports of customer complaints on a form "U-5". NASD Rules @ 3-b also require that the U-5 be amended within thirty (30) days upon discovery of information which rendered the prior U-5 incomplete or inaccurate. Hancock did not amend the anonymous U-5 until four years later.

Defamation claim could not have been raised prior 1996 disclosure. The court ruled an impossibility, i.e. the claim should have been asserted in the Carroll v Hancock which concluded in 1994.

2. First Recast complaint

In 1996, Hancock published a U-5 reporting Tellie arbitration 92-04046 and his 1994 award. Tellie filed his arbitration and complaint against Hancock. The award was solely against Hancock. The Tellie 96 U-5 recast his complaint, arbitration and award as if they were against Olick. Hancock didn't disclose its liability in Tellie U-5. Hancock had no reasonable basis to recast Tellie's complaint as a claim against Olick. Olick could not have filed suit before Hancock's 1996 publication of the U-5.

In his 96 Arbitration, Olick alleged that Hancock defamed him and interfered with his employment by improperly recasting Tellie's U-5. Dispute was subject to NASD Required Submission Rules and U-4, Olick's binding arbitration agreement.

The 3rd Circuit opined in 97-1956 that arbitrable claims, not previously decided in a civil litigation, must be decided by arbitrators and not the courts. Orders in this appeal stating that, because the claims based on the 96 Tellie U-5 weren't raised in the Carroll Litigation (concluded in '94), the issue was res judicata. It also opined that Hancock's publication of the Tellie 96 U-5 was not defamatory even if it recast the arbitration and award.

That ruling is an open invitation to misconduct and contradicts the NASD Rules which require complete and accurate disclosure. It allows broker-dealers to undermine the NASD's Rules to use the U-5s as means of creating a "black list" to drive agents out of the securities industry (a violation of the Sherman Anti-Trust Act).

3. Second recast U-5

Hancock published a 1996 amended Zamolyi U-5. Its prior U-5 reported that its investigation found "no improperities." Zamolyi then filed a second complaint against Hancock employee Kimberly Spense, alleging she promised him a payment in his first complaint (Statement of Claims App 75 @ 132). Hancock's own internal notes stated that in '92 it made a "business decision" to settle the claim about Spense's improper promise. The 96 Zamolyi U-5 didn't state that his complaint was against Spense or that the payment was made as a "business decision" to settle his complaint against her. The 96 U-5 stated payment was made to settle claim against Olick. Zamolyi U-5s also didn't reveal his allegation that "Hancock lied to Olick who then sold the limited partnership to us." Hancock's Zamolyi U-5 also failed to reveal that the complaint was only filed after Nikles told Zamolyi that his limited partnerships were unsuitable and high risk investments. Zamolyi's letters also alleged claims against Hancock, Nikles and DiMento. Those allegations against Hancock's other employees were not reported on any U-5. In violation of NASD Rules @ Article IV, the two Zamolyi U-5s were neither complete nor accurate.

Olick couldn't file his suit until Hancock published the 96 Zamolyi U-5. Olick couldn't file a suit on the first Zamolyi U-5 until December 1993 when he found the "new evidence" in the 92 Arbitration (App 94 para 6). Because Nikles statements precipitated Zamolyi's complaint, Olick's U-4, the FAA, NASD's Rules and the Nikles Order required

arbitration of Olick's dispute (see Nikles Order App 13-20).

The orders improperly opined that disputes about the Zamolyi U-5s were res judicata because they were not brought in the Carroll Litigation. They ruled upon the merits of Olick's 96 Arbitration claims, stating that, even if the Zamolyi 96 U-5 was inaccurate and incomplete, it wasn't defamatory because it "contained nothing new besides representations by (Hancock) concerning the outcomes of arbitrations or internal investigations and the payment of money to resolve complaints, and these representations do not constitute defamation." (3rd Cir 00-1147, App 115). Changing the report from "no improprieties were found" to falsely reporting a payment for allegations against Olick was a material change and is defamatory since that statement is untrue, inaccurate and published solely to damage Olick (the payment was really to settle the complaint against Spense). The 96 NASD Statement of Claims alleged that they were defamatory because the "documents they disseminated and statements they had made, were misleading, deceptive and false, and the distribution of which would cause serious and irreparable harm to the Plaintiff in his income, property and reputation." (App 83 @ 171).

The order violates the NASD's Rules, the FAA and the unappealed Appellate decision in 97-1956 (opining that the merits of arbitrable claims must be decided by arbitrators and not courts).

f. The lower courts orders creates new law requiring litigants to violate the FAA and arbitration agreements

There is no relationship between Olick's sales of Hancock's limited partnerships and a lawsuit filed by John Carroll (alleging Corby had sold unregistered securities). No Carroll plaintiff alleged that Olick had sold them any of Hancock's partnerships. No Carroll plaintiff testified that Olick was present at, or had knowledge of, Corby's sales to them.

The court had no basis to enjoin the 96 Arbitration (alleging Hancock's deceptive marketing of limited partnership, efforts to recast its deceptive sales practices upon Olick, defamatory U-5s, efforts to solicit complaints falsely alleging that Olick sold unsuitable limited partnership to his customers, malicious prosecution in the 92 Arbitration and the disallowed 93 Bankruptcy claims, etc.) see Statement of Claims App. 77 @ 146-49, 167-68, 183 & 201 f&h). The court didn't have jurisdiction to rule upon the merits of 96 Arbitration claims, to bar the claims which bankruptcy special counsel was pursuing (opining that they were barred because they should have been pursued in the bankruptcy court 3rd Cir 00-1147 App 116)), to opine that claims should have been filed before evidence was discovered or the defamatory act occurred, or to enjoin claims totally unrelated to the Carroll Litigation, or to opine that they should have been brought in Carroll litigation.

The orders created new law requiring litigants to violate the FAA and arbitration agreements. That new law also requires litigants to file claims before the information is discovered or the damaging acts occurred. It also requires litigants to file cross claims in litigations which

the parties have agreed were not related to the issues.

Background

1. Hancock's limited partnerships

In order to understand the issues, the Court must become acquainted with the history of the dispute. Appellant became licensed to sell securities in 1983 as a person associated with Hancock. He signed a NASD Uniform Application for Securities Industry Registration (the "U-4"), which required Olick to arbitrate his disputes with NASD Member firms, associated persons and customers (app 105 para 5, see also Nikles Order @ App 16-17). Thomas Nikles and Joseph Corby were associated persons in privity and associated with Hancock (see Nikles Order @ App 17) (opining that "the relationship between the parties arises out of the plaintiff's and defendants' connection with John Hancock"). Joseph DiMento was an "associated person" who supervised Corby, Olick and Nikles. During the 1980's, Olick sold limited partnerships marketed by Hancock as safe, low risk, or fully insured investments. Olick's contract with Hancock required that he use Hancock's marketing materials and "Sales Tracks." Using these Sales Tracks, Olick sold those limited partnerships to himself, his family and his customers.

There is no relationship between those limited partnerships and the general partnership CMG as noted below.

2. CMG and the Carroll Litigation

In 1992, John & Kathryn Carroll, Marlin Stock, and George & Kathryn Klassen filed 92-c-5907 E.D. Pa. against Joseph Corby, Hancock, Olick and a total

of nineteen defendants (the "Carroll Complaint"). It alleged that Corby had sold them unsuitable and unregistered securities (i.e. interests in the general partnership Capital Management Group, "CMG"). John Carroll was the Vice-President of CMG. Marlin Stock was the treasurer of CMG. Kathryn Klassen was John Carroll's sister. Joseph Corby was the President of CMG.

In that suit, Corby "rolled over," agreed to admit to any allegation made against him, used Carroll's attorney's as his de facto counsel, met with them on a weekly basis, stored all of his records in their office and used their offices and equipment. Corby gave sworn testimony in NASD 94-05051, (Olick v Nikles, the "Nikles Arbitration"), that he received money from Carroll's attorneys while the Carroll Litigation was proceeding.

CMG was controlled by a Partnership Committee which was elected annually by a vote of all its members. The Partnership Committee had absolute control over CMG's day to day operations, its investment decisions, its bank accounts, and the right to fire or hire CMG's employees, accountants and legal counsel. No Carroll plaintiff alleged that Olick was present at Corby's "sales" to them, had any knowledge of Corby's sales presentations, had control over Corby's activities or that they knew of Olick at the time of the alleged sales. The Carroll plaintiffs further admitted that they knew that CMG was not related to Hancock. In 1994, the Carroll Litigation was dismissed against Olick with prejudice. Hancock and the other defendants settled the Carroll Litigation in a Confidential Settlement.

The Confidential Settlement also

settled various state court litigations against Hancock and Corby. The state court plaintiffs included individuals who filed claims in Olick's 93 Bankruptcy. No complaint was filed, Olick was never served and no proceedings occurred in those state court actions.

CMG Claims

The Carroll Plaintiffs and various state court plaintiffs filed $280,000 in creditors' claims (the "Assigned Claims") in Olick's Bankruptcy 93-23114. Although the Assigned Claims alleged the sale of unsuitable and unregistered securities, no specific investment was identified on the Proof of Claims. John Gallery III (who filed an Assigned Claim) testified that the unsuitable investment was a non-Hancock registered security called Baytide 88 and that he did not purchase it from Olick. Immediately upon those admissions, Gallery's (and the Assigned Claims') attorney requested a recess to begin settlement negotiations.

In December 1996, Hancock filed a transfer of the Assigned Claims from the Carroll Plaintiff's and the state court creditors. Olick discovered ~~in 1997~~-8 that, as part of the Confidential Settlement Agreement, the parties transferred their claims against Olick to Hancock but agreed to pursue them in Olick's bankruptcy as straw parties. On 4/19/94, Hancock was granted relief from the Bankruptcy Stay to pursue its claims in NASD 92-04070 (App 106). In 1995, the bankruptcy court disallowed several of the Assigned Claims and all of the Carroll Plaintiff's creditor claims.

Olick did not discover Hancock's straw party arrangement until after his

93 Bankruptcy was dismissed and the Carroll litigation concluded. He couldn't have filed a malicious prosecution claim against Hancock in either of those two already concluded legal proceedings.

The aforementioned orders improperly opined that Olick's malicious prosecution claims were barred because he did not raise them in the Carroll Litigation or in his bankruptcy. The bankruptcy court's order of 4/29/97 (App 21-22) required Special Counsel to pursue the claims in the 96 Arbitration.

The 3rd Cir. 8/22/01 order In Re Olick 00-1014, which affirmed its prior 9/10/99 order (Hancock v Olick 202 F 3d 254 (Table), and the 8/28/01 order in 00-1147 @ App 116) enjoined Olick's arbitrations, because: "these claims were or should have been brought through the bankruptcy proceedings and are thus barred." see App 116). Those orders denied Olick his Constitutionally guaranteed right of DUE PROCESS, i.e. to litigate his claims in any forum.

3. Hancock's indemnity suit @ Tellie

Joseph Tellie filed NASD arbitration 92-04046 against Hancock alleging deceptive sales practices (the "Tellie Arbitration"). Hancock filed a third party claim against Olick, alleging that Tellie's damages were caused by Olick.

Tellie won his arbitration. Hancock's third party claim was stayed by Olick's 1993 Bankruptcy petition. (Statement of Claims, App 77 @ 144-49).

4. Olick's 92 Arbitration

Olick filed NASD Arbitration against Hancock (92-04070, the "92 Arbitration". The 92 Arbitration alleged

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that Hancock had used false and deceptive sales literature to sell him and his family limited partnerships.

Hancock filed creditors claims in Olick's 93 Bankruptcy and requested the Bnkr. Stay (B.R. 362) be lifted so that they might pursue their claims against Olick in the arbitration. On 4/19/94, the Stay was lifted (App 106). Hancock then prosecuted claims against Olick seeking indemnity for monies it paid to Tellie and Olick's customers who had purchased limited partnerships. Olick denied the indemnity claims as being without merit and had no basis in contract or law.

On 9/28/95, Olick received an award against Hancock. Hancock indemnity claims were denied (see App 78 @ 149). Olick could not file malicious prosecution claims against Hancock in the Carroll lawsuit or before its claims were denied.

5. Olick's 96 Arbitration

Olick filed NASD 96-01247 arbitration against Hancock ("96 Arbitration"), alleging $30,000 in expense defending against Hancock's claims in the 92 Arbitration (App 77 144-49 & 201), that he was damaged by its bankruptcy creditor claims in the amount of $280,000 (App 82 @ 165-68, 182-88 & 201), and was defamed by Hancock's 96 U-5s (App 83 @ 171).

The court improperly enjoined the 96 Arbitration opining that Olick should have brought those claims in the Carroll Litigation which concluded in 1994. That order improperly denied Olick Due Process or the right to litigate in any forum.

6. The Nikles Arbitration

In late 1992, Olick became aware that customers were filing complaints

against him. Hancock filed "anonymous" U-5s alleging the sale of unsuitable limited partnerships by misrepresenting risks. Hancock later amended some (not all) of the U-5s identifying the customers. Hancock refused to provide Olick with the complaint letters.

In late 1992, the NASD gave the complaint letters to Olick. Those letters stated complaints were filed after Nikles told them that Olick sold them unsuitable and "risky investments." Olick filed a defamation suit against Nikles and the customers who filed those false complaints (Olick v Nikles 93-1495, the "Nikles Lawsuit"). Nikles motion to remand to NASD arbitration pursuant to binding written arbitration agreements (the U-4), FAA and NASD's Rules was granted on 11/26/93 (App 13-20). Olick filed NASD 94-05051 (the "Nikles Arbitration") and was awarded $100M.

6) Olick's Request to Amend his Carroll Answer and to file cross claims

During a 12/93 inspection of documents produced by Hancock in the 92 Arbitration (App 94 @ 6), Olick discovered "new evidence" which revealed for the first time that Hancock had encouraged Nikles to solicit complaints against him. Upon that discovery (i.e. six months after filing his answer in Carroll) Olick sought to amend the 92 Arbitration Statement of Claims to include new claims and sought in Carroll "PERMISSION" to file cross claims against Hancock and to add Nikles as a defendant. The Carroll court denied the motion and opined that a cross claim must be part of an answer to the complaint (App 51). Olick then petitioned

the court for PERMISSION to amend his answer to include cross claims and to add additional defendants. The court opined that Olick could not file a cross claim because the Carroll Lawsuit was "Stayed" by his 93 Bankruptcy. The Carroll plaintiff's then obtained relief from the Stay.

Thereupon, Olick again sought "PERMISSION" to amend his answer, to file a cross claims and to add Nikles as a defendant ("Olick Request" App 92-95). Hancock filed a brief in opposition to Olick's Request (App 96-102), alleging Olick was barred by his U-4 and the FAA, that it was in privity with Nikles and that the prior 11/26/93 Nikles Order (App 13-20) also applied to them (arguing the issue was res judicata by that order), that the cross claims were unrelated to the Carroll Litigation, that the motion was "untimely" because it should have been filed with an answer to the complaint and that (because there is no recognized motion for Permission to file cross claims) it "lacked merit." The court agreed with Hancock and on 6/24/94 issued two orders stating: "the motion is untimely and lacks merit" (App 49), the second order permitted the filing of an amended answer but threatened that "The answer shall comply with our other order issued this date in which we denied defendant's request to file third party claims. If necessary we shall enforce this order with sanctions." (App 50).

Since the Request but no claim or complaint was filed, the claims could not have been an adjudication on the merits. Since the evidence was not discovered until six months after he answered the Carroll Litigation, Olick could not have previously filed cross claims. Contrary

to statements in subsequent opinions, there is no evidence that the Carroll court could have or did rule upon the "merits" of Olick's unfiled cross claims. Res judicata does not apply because Olick never had an opportunity to raise the claims and there was never any adjudication on their merits. The courts' orders improperly enjoined the 96 Arbitration opining "There is no evidence or claim presented now that could not have been presented at the first (Carroll) proceeding." see App 22). Olick was denied DUE Process guaranteed to him by the Fifth and Fourteenth Amendments to the U.S. Constitution.

Reasons for Granting the Writ

1. THE PETITION SHOULD BE GRANTED BECAUSE THE PRESIDING JUDGE HAD A CONFLICT OF INTEREST BY NEGOTIATING EMPLOYMENT WITH A LAW FIRM REPRESENTING THE RESPONDENTS CONTEMPORANEOUSLY WITH THE ENTRY OF HIS FINAL ORDER

A hearing by an impartial and disinterested tribunal is a basic guarantee contained implicitly in the Due Process Clause of the 14th Amendment. Pa. Code Judicial Conduct @ Cannon 3 C (1) states that: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned ..."

It is essential for the courts to maintain its impartiality and to avoid circumstances which might call into question the judge's impartiality. Implicitly stated under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, Olick has a basic guarantee to a "fair and impartial

trial." A judge has a duty and obligation to inform the parties of matters which would call into question, or tend to call into question, his impartiality or his conflicts of interest. He isn't permitted to conceal that information. The judge should voluntarily recuse himself from litigation where he may be prejudiced.

A party cannot request the judge to recuse himself when the information is concealed. Hancock has not denied that the judge became employed by one of its' law firms. Hancock has not denied that the judge had a conflict of interest. Instead, Hancock argued that Olick waived his right to raise the issue by not raising it before he filed his appeal.

However, it wasn't raised earlier because it wasn't discovered until after the judge issued his final order. The 3rd Circuit opined (App 2) that: "Olick argues that ... (1) the District Court Judge should have recused himself because he was negotiating employment with the law firm representing Hancock ... There is no merit to these arguments. Olick's conflict of interest claim was not raised in the District Court and is therefore waived on appeal Armbruster v Unisys Corp 32 F3d 768, 772 n4 (3rd Cir 1994); Frank v Colt Industries, 910 F2d, 100 (3rd Cir 1990)."

The case law cited by the 3rd Circuit is not to the point. Those cases refer to appeals wherein the argument or defense was known, but not raised, prior to the filing an appeal. In this case, information was concealed and the party did not have an opportunity to raise it. Cowgill v Raymark Ind. Inc. 832, F 2d 798 (3rd Cir 1987) opined:

"With respect to the remainder of the

> evidence, she has suggested no reason why it or comparable evidence could not have been obtained by her before the original summary judgment was entered. Thus, this is not a case in which `newly discovered evidence' became available after the original decision was made ... Nor does it come within any other category of case we have recognized as exceptions to the doctrine of law of case and collateral estoppel ..."

The court erred when it opined that Olick's "newly discovered evidence" did not justify review of the order. The 3rd Circuit's opinion would be an incentive to conceal material evidence to prevent a fair trial. The lower court's orders should be reversed and remanded for consideration by an impartial tribunal.

2. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW VIOLATED 9 U.S.C. BY IMPROPERLY DETERMINED THE MERITS OF CLAIMS AND DEFENSES SUBJECT TO A BINDING ARBITRATION. THIS DETERMINATION IS INCONSISTENTLY APPLIED IN VARIOUS CIRCUIT COURTS AND THE MATTER SHOULD BE DECIDED TO UNIFY THE APPLICATION OF THE FAA.

The National Association of Security Dealers Inc.'s (the "NASD") By-Laws and Rules of Fair Practice require that any U-5 filed be complete and accurate (see Securities Regulation @ 40.15, see Dawson v New York Life 932 F Supp 1509 (N.D. Ill 1996). NASD By-Laws @ Article IV @ "3(b) imposes the additional duty to amend the notice within 30 days of learning facts or circumstances causing any information set forth in said notice to become

inaccurate or incomplete". Dawson @ 1537.

On April 25, 1996, Hancock filed a series of NASD Forms U-5. Those U-5s were defamatory (e.g. Anonymous, Tellie, and Zamolyi U-5s). They were inaccurate and incomplete. They recast, embellished or were fictitious. The 96 U-5s claims could not have been plead in Carroll Litigation (concluded '94). Hancock does not deny that it failed to timely amend the Anonymous U-5. It can't deny that Tellie Arbitration and award was against it.

An arbitration panel (not the court) should determine the merits of Olick's claims. The court improperly enjoined Olick's 96 Arbitration, opining that the 96 U-5s were not defamatory because they only amended prior U-5s to report payment of money to the customers (App 115).

The orders conflict with the 3rd Circuit opinion in Hancock v Olick No 97-1956 (App 31), opining that: "Arbitration is, above all, a matter of contract and courts must respect the parties' bargained-for method of dispute resolution ... Thus, there is a strong policy in favor of arbitration and courts must resist the attempt to intrude upon arbitration proceedings where the statute does not explicitly authorize court involvement."

The order conflicts with FAA @ 3 which provides that a court must stay its proceedings if it is satisfied that an issue is arbitrable under the agreement.

The order conflicts with the NASD Code of Arbitration Rule 3706, Sec. 6 which have been adopted and approved by the SEC pursuant to the 1934 Securities and Exchange Act: "No party shall, during the arbitration of any matter, prosecute or commence any suit, action or procedure

against any other party touching upon any of the matters referred to arbitration pursuant to the Code." Since Olick had petitioned the 92 Arbitration Panel to add those additional claims, he could not have litigate them until September 1995.

The disputes is between a member, Hancock, and an associated person, Olick; relates to Hancock's business and Olick's termination. The NASD Code of Arbitration @ Part II 3708, Sec. 8 (a) requires:

"Any dispute, claim or controversy eligible for submission Under Part I of this Code between or among members and/ or associated persons, and/or certain others arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) with such member, shall be arbitrated under this Code ..."

The 3rd Circuit's decision in 97-1956 regarding arbitration differs from that of the 2nd Cir and other courts (see App 34) (opining that estopple is a matter to be decided by an arbitrator and not the courts). The law is unsettled between the various circuits. Therefore, this Court should enter a ruling which would resolve the differences. As in this case, the courts entered orders which determined the claims' merits without providing him a full and fair hearing on the claims and/or the right to amend or elaborate upon his claims, rights granted by courts in a normal suit.

The district court did not have authority to determine the merits of Olick's 96 U-5 defamations claims. The court improperly enjoined the arbitration. The

order should be vacated and the matter remanded to arbitration.

3. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH PRIOR DECISIONS BY THE SAME JUDGE IN RELATED DISPUTES WHICH HAD REMANDED SUITS OF PARTIES IN PRIVITY TO BINDING NASD ARBITRATION

Olick, Nikles and Hancock were in privity because of their employee and employer relationships. The Nikles Order stated: "... the relationship between the parties arise out of the plaintiff's and defendant's connection with John Hancock ... The FAA dictates that this court must order arbitration according to the terms of the agreement and stay the proceedings in this court pending the outcome of the arbitration. 9 U.S.C. @ 3, 4."

When the court issued the Nikles Order, the issue became res judicata and it was a final determination of the requirement for arbitration for not only Olick and Nikles, but also for related claims against those parties in privity with Nikles (i.e. Hancock and DiMento). The same judge who enjoined the 96 Arbitration also opined in his 12/14/98 Order in 99-c-4460 (App 10):

> "res judicata may be invoked against a plaintiff who has previously asserted essentially the same claim against different defendants where there is a close or significant relationship between successive defendants (citing Gambocz v Yelencies 468 F 2d 837, 841 (3rd Cir 1972) other citations omitted"

Hancock objected to Olick's motion to file cross claims because of its privity with Nikles and the Nikles Order. Hancock's brief argued that:

"... (Olick's) proposed claims are duplicative of claims he is already asserting in a pending litigation before Honorable Edward C. Cahn in the case styled Olick v Nikles, ... 93-cv-1495 (which) Judge Cahn ... referred ... to NASD Arbitration. Accordingly, there is no basis for allowing Olick to relititigate claims that already ... being addressed in ongoing litigation or arbitration ... these filings, in essence would spawn a totally new and distinct cause of action ... the proposed claims of Olick are subject to arbitration to be conducted by the National Association of Security Dealers (App 97) ... In short, the claims Olick seeks to foist into this lawsuit are totally unrelated to the issues raised by the plaintiff's cause of action and ... they clearly are premature (App 100-01). Although Olick motion generally describes the additional claims he desires to assert, the motion is not accompanied by any proposed complaint. The failure to include the proposed complaint may be sufficient to deny Olick's motion." (App 96 n1).

The court denied Olick's Request to file 3rd party claims (App 49-51). This judge, while negotiating employment with a Hancock law firm, then enjoined the 96 Arbitration because Olick should have, but did not, raise his claims in Carroll (App 12). That order is inconsistent with his final order in Nikles (opining: that the claims arose out of Olick's employment with Hancock and the FAA dictates that Olick could not file the claims in the courts, App 13-20). Olick could not assert his 96 Arbitration claims in Carroll because: (1) they were

not discovered within 90 days of filing his answer, (2) the events causing damages occurred after the Carroll Litigation concluded, (3) malicious prosecution claims could not be asserted until after there was a final ruling in Olick's favor, (4) the arbitration claims were unrelated to the Carroll litigation and ineligible for prosecution therein, (5) Olick was barred by the Nikles Order against a party in privity with Nikles, and (6), the FAA, NASD Rules and the U-4 required him to arbitrate his claims.

There was no legitimate reason to order that the arbitrable claims were enjoined because Olick should have, but didn't raise them in the Carroll suit.

4. THE WRIT SHOULD BE GRANTED BECAUSE THE ORDERS BELOW DENIED APPELLANT DUE PROCESS, ARE EVIDENT OF A GROSS DISREGARD FOR PENNSYLVANIA STATUTES AND SETTLED CASE LAW, UNDERMINES THE UNAPPEALED BANKRUPTCY COURT'S ORDERS AND INTERFERES WITH THAT COURT'S MANAGEMENT OF THE APPELLANT'S BANKRUPTCY ESTATE'S AFFAIRS.

The courts violated the 5th and 14th Amendments of the U.S. Constitution by denying Olick his guaranteed right to due process (enjoining his right to seek damages against Hancock in any forum). The court outrageous determined that no claims for defamation or malicious prosecution were alleged in the 96 Arbitration even though these legal terms (defamation and malicious prosecution) was clearly alleged by name as damages. The order also barred Olick from seeking damages the Bankr. Ct. clearly remanded to the 96 Arbitration. The 3rd Cir. in Hancock v Olick 202 F 3d 254 (Table)

opined (App 46 @ II):

"two of his claims are for malicious prosecution in the NASD proceedings. The first concerns the appellees' indemnity claims, a final order denying which was not issued by the Arbitration panel until September 1995. The second concerns appellees' attempts to collect assigned claims in Olick's two bankruptcy actions, which Olick did not discovered until December 1996 and March 1997. There is no merit to his argument. We have read all two hundred and one paragraphs of Olick's pending arbitration claims but can find no reference in it to any such malicious prosecution claims ..."

The 96 Arbitration raised malicious prosecution claims at App 87 para. 183 (Hancock) "attempted to recover (money) from Olick by filing false and malicious claims through the NASD and the U.S. Bankruptcy Court". It sought damages for those malicious prosecutions at App 90 @ 201, "Olick has been damaged by the aforementioned acts in his property, business and reputation in the amounts noted as follows: (f) Bankruptcy Claims and Costs: $280, 000 (h) malicious prosecution: $30,000."

On 4/19/94 the 93 Bankruptcy court opined @ App 106: "John Hancock Distributors Inc. is hereby granted relief from the automatic stay under 11 U.S.C. @362 for the purpose of prosecuting the counter claims asserted by it against Thomas Olick in ... NASD Case No. 92-04070". By this act, Hancock made a choice of forum, i.e. NASD arbitration. That order was not appealed and is res judicata. The court improperly opined that the claims should have been brought in Bankruptcy Court.

Early in 1997, Hancock petition the NASD Panel to dismiss the 96 Arbitration, contending that only the Bankruptcy Trustee could prosecute the claims and the matter must be brought before the Bankruptcy Court. In response, Olick petitioned the Bankruptcy Court to appoint NASD special counsel to arbitrate the Bankruptcy Estate's claims against Hancock. Hancock filed objections to the appointment of special counsel. The Bankruptcy order of 4/29/97 denied the objections (App 21): "... upon consideration of Debtor's Motion to Appoint Counsel to Assist in the Adjudication of Debtors' Bankruptcy Estate's Claims in NASD Arbitration 94-05051 and 96-01247 ... the said application is, therefore Granted ... all objections overruled." Arbitration became res judicata when Hancock failed to appeal this order.

The 3rd Cir opined in 00-1147,(App 116): "The District Court did not address this claim (the malicious prosecution of creditor's claims) in its order granting permanent injunctive relief but in its earlier order granting a preliminary injunction found that these claims should have been brought through the bankruptcy proceedings and are thus barred."

By barring Olick from prosecuting claims remanded to arbitration by the Bankruptcy Court, Olick was denied due process and the right to prosecute them in any forum. The order should be vacated and the dispute remanded to arbitration.

5. THE WRIT SHOULD BE GRANTED BECAUSE THE ORDERS BELOW REVERSE EXISTING LAW GOVERNING ARBITRATION AND PLACES A NEW REQUIREMENT THAT PARTIES BREACH ARBITRATION AGREEMENTS AND VIOLATE THE FAA, REQUIRING

SUIT IN FEDERAL COURTS FOR CLAIMS WITHIN THE SCOPE OF ARBITRATION AGREEMENTS.

The FAA @ 3 provides that a court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement. There is also no dispute that NASD Code @ Part II 3708, Sec. 8 (a) "Required Submissions" provides that a member firm (Hancock) and its associated persons (Nikles, Olick and DiMento) must arbitrate their disputes.

As Hancock had observed (App 97): "... the proposed claims of Olick are subject to arbitration to be conducted by the National Association of Security Dealers." Hancock also admitted (App 96 n1) that: "Although Olick's motion generally describes the additional claims he desires to assert, the motion is not accompanied by any proposed complaint." Hancock had admitted that estopple prevented Olick from raising his claims in Carroll. The Carroll Court could not enter a decision based upon the merits of claims unfiled because the Nikles Order estopped Olick from filing them.

The same judge who issued the Nikles Order and cited claim preclusion for a party in privity in his 12/14/98 order (App 9 @2), enjoined the 96 Arbitration because Olick did not but should have brought those claims in Carroll.

The only explanation for these contradictory orders is the judge's pending employment in a Hancock law firm.

There is no question in this case that Hancock was in privity with its employee Nikles, the Nikles Order was binding upon Olick's 96 Arbitration claims against Hancock in the related disputes on related issues (Hancock's aid

in Nikles' solicitation of complaints against Olick @ limited partnerships).

Therefore, the order enjoining the arbitration was either in error or it creates new law which require litigants to breach arbitration agreements, violate the FAA and the NASD Rules. It places a new burden upon litigants to file suit before evidence is discovered or the damaging deeds are performed.

Those consequences of the below courts' orders are inconsistent with existing law and to implement them, the courts would deprive litigants of due process, denying the rights of parties to obtain damages before they have had an opportunity to be heard by a fair and impartial tribunal.

Conclusions

Petitioner Thomas W Olick respectfully requests that the Supreme Court grant his Writ of Certiorari because the lower courts' decisions are inconsistent with his Constitutionally guaranteed rights under the Fifth and Fourteenth Amendments to a full and fair trial before an impartial tribunal. The opinions of the various circuits conflict with each other and should be settled. The lower court's orders should be vacated and the disputes remanded to binding arbitration as contemplated in the contracts voluntarily executed by the parties.

Respectfully Submitted:

T W Olick
4014 Crestview Ave
Easton, Pa 18045
610-253-8040

No. _____

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In The

SUPREME COURT OF THE UNITED STATES

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THOMAS W OLICK
PETITIONER

V

JOHN HANCOCK DISTRIBUTORS INC.
RESPONDENT

==========

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

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PETITIONER'S EXHIBITS

UNREPORTED-NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No 00-1014

JOHN HANCOCK DISTRIBUTORS INC.
JOHN HANCOCK MUTUAL LIFE INS. COMPANY
LARRY CARTER
v
THOMAS W OLICK
APPELLANT

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-cv-04460)
District Judge: Hon. James T. Giles

Submitted Under Third Circuit LAR 34.1(a)
August 28, 2001

Before: Sloviter, Roth and Cowen
Circuit Judges

(Filed: August 28, 2001)

OPINION

PER CURIAM

We will not set forth the factual and procedural background to this case; the parties are familiar with the history of this case and the background has already been adequately detailed by us in two prior appeals: John Hancock Mutual Life

Ins. Co. v Olick, 151 F3d 132 (3rd Cir 1998); John Hancock Distributors et. al. v Olick, 202 F.3d 254 (Table) (3rd Cir, Sept 10, 1999) (Nos. 98-2178, 99-1123).

Before us is Olick's appeal from the District Court's denial of his Rule 60(b) motion for relief from a final order enjoining one of his arbitration proceedings. Olick argues that the District Court should have relieved him from its injunction against the NASD Arbitration proceedings because; 1) the District Court Judge should have recused himself because he was negotiating employment with the law firm that represented Hancock; 2) Hancock made factual misrepresentations to the District Court concerning Olick's claims, including telling the District Court that Olick asserted no claims for malicious prosecution or defamation; and because 3) the District Court's final order issuing the injunction was manifestly unjust. *1

There is no merit to these arguments. Olick's conflict of interest claim was not raised in the District Court and is therefore waived on appeal. Armbruster v Unisys Corp. 32 F 3d 768, 772 n.4 (3rd Cir 1994); Frank v Colt Industries, 910 F2d 90, 100 (3rd Cir

*1 Olick also contends that the District Court lacked subject matter jurisdiction to entertain Hancock's request for an injunction to stay arbitration proceedings before the NASD. However, we have already found that the District Court had such jurisdiction pursuant to 28 U.S.C. @@ 1331 and 1332. John Hancock Mutual Life Ins. Co. v Olick, 151 F 3d 132, 134 (3rd Cir 1998).

1990). Hancock's pleadings and legal arguments in the prior federal case are not "newly discovered evidence" and are not material to whether the prior federal judgment precludes the NASD proceeding. Even if it were true that Hancock misled the District Court, the Court's legal determination that the prior federal judgment has preclusive effect was made based on its independent review of the case and was not determined by the factual statements of one of the parties. Olick's claim that he asserted malicious prosecution and defamation claims in his NASD proceeding was specifically addressed by us in John Hancock Distributors et. al. v Olick, 202 F 3d 254 (Table) (3rd Cir. Sept. 10, 1999), affirming the District Court. Finally, with regards to Olick's claim that the District Court's final order was unjust, we previously reviewed the merits of the District Court's final order enjoining the NASD proceeding and affirmed its judgment, agreeing with its conclusions. Rile 60(b) cannot be used to reargue issues that we have previously resolved.

Accordingly, we find that the District Court did not abuse its discretion in denying Olick's motion *2 and shall affirm that court's judgment. The Appellees have sought leave to file a motion for just damages and single or double costs under Fed. R. App. P. 38. Any such motion must be filed within fourteen days of the filing of this opinion.

*2. We review the denial of a Rule 60 (b) motion for abuse of discretion. Federal Deposit Ins. Co. v Deglau, 207 F 3d 153, 167 (3rd Cor 2000).

App 4

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No 00-1014

JOHN HANCOCK DISTRIBUTORS INC.
JOHN HANCOCK MUTUAL LIFE INS. COMPANY
LARRY CARTER
v
THOMAS W OLICK
APPELLANT

SUR PETITION FOR REHEARING

Before: Sloviter, Roth and Cowen
Circuit Judges

The petition for panel rehearing filed by appellant in the above-entitled case having been submitted to the panel, and no members of the panel having asked for rehearing, the petition for panel rehearing is denied.

By the Court,

/s/
Circuit Judge

Dated: 16 October 2001

App 5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN HANCOCK DISTRIBUTORS INC. et. al. Plaintiff v THOMAS W OLICK Defendant	96-c-4460

ORDER

AND NOW, this 14th day of December 1998, upon consideration of Plaintiff's motion for summary judgment, Defendant's response thereto, Plaintiff's Reply Brief and Defendant's supplement to his answer to Plaintiff's motion for summary judgment, it is ORDERED that the motion is GRANTED as follows:

1. Plaintiff's Motion for Summary Judgment on all counts is GRANTED,

2. Judgment is entered in favor of John Hancock Distributors Inc., John Hancock Mutual Life Insurance Company, and Larry Carter, Plaintiffs, and against Thomas W Olick, Defendant.

3. The Clerk of Court shall close the docket for statistical purposes.

By the Court:

/s/

Edward W Cahn, C.J.

Entered 12/15/98

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN HANCOCK DISTRIBUTORS INC. et. al. Plaintiff v THOMAS W OLICK Defendant	96-c-4460

MEMORANDUM

Cahn, C.J. December 14, 1998

Background

The parties are familiar with the history of this case. In addition, much of the relevant background is set forth in detail in the opinion of Judge Seitz (*1) of the United States Court of Appeals for the Third Circuit. (* 2) Before the court on remand from the Court of Appeals is John Hancock's ("Hancock") Motion for Summary Judgment. (* 3)

* 1. The court was saddened by the recent passing of Judge Collins J. Seitz, a distinguished jurist who spent more than fifty years on the Delaware Court of Chancery and the United States Court of Appeals for the Third Circuit.

* 2. The court in that case held that although arbitration must decide the issue of res judicata with respect to a prior arbitration award, the court must decide the same issue of res judicata with respect to a prior court judgment.

* 3. Summary judgment is proper when the "pleadings, depositions, answers

(* 3 continued) to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." See Anderson v Liberty Lobby Inc. 477 U.S. 242, 248 (1986). In addition, a dispute about material facts must be "genuine" such that a reasonable jury could enter a verdict for the nonmoving party. Id. The moving party had the material burden of producing evidence purporting to establish the absence of a genuine issue of material fact . However, if the nonmoving party fails to produce sufficient evidence with respect to an essential element of its claims and for which it will bear the burden of proof at trial, then the moving party is entitled to summary judgment. See Celotex Corp. v Catrett 477 U.S. 317, 322-23 (1986). Once the moving party meets its burden, the nonmoving party must come forward with specific facts contradicting those set forth by the moving party, thereby showing that there is a genuine issue for trial. See Matsushita Elect. Indus. Co. v Zeneith Radio Corp. 475 U.S. 574, 586-87 (1986). Although the court considers the nonmovant's evidence as true and draws all reasonable inferences in the nonmovant's favor; see Anderson, 477 U.S. at 2244, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Olick

I. Hancock Avers that Olick's Claims are barred by Res Judicata.

Hancock argues that the claims that Thomas W. Olick ("Olick") asserts in this case are barred by res judicata, or claim preclusion, because the claims, and factual circumstances out of which they arise, are identical to claims previously litigated in the United States District for the Eastern District of Pennsylvania in the case captioned John J Carroll Jr. v John Hancock Distributors Inc. No 92-CV-5907 ("Hancock I"). (n. 4)

(* 3 continued) has been unable to show that any genuine issue of material fact exists and therefore the court will grant Hancock's Motion for Summary Judgment.

Collateral estoppel, or issue preclusion, bars the relitigation of an issue identical to that addressed in a prior action. Res Judicata is broader in effect and "prohibits reexamination not

* 4. In Hancock I, Carroll alleged that Olick and Hancock were liable under the federal and state securities laws for Olick's misrepresentations in selling plaintiff's unregistered gas and oil partnerships. On February 2, 1994, Olick filed a Motion to Assert Cross-Claims against Hancock. On June 24, 1994, Judge Franklin S. Van Antwerpen dismissed Olick's Motion to file Cross Claims and Third Party Claims stating that it "lack(ed) merit." Olick did not appeal that Order. On November 29, 1994, Judge Robert S. Gawthrop III signed an Order dismissing the 1992 federal actions against all of the defendants. Once again, Olick did not appeal.

not only of matters actually decided in a prior case, but also those that the parties might have, but did not, assert in that action." Williams v Lehigh County Dept of Corrections, 1998 WL 634893, at *1 (E.D. Pa Sept. 15, 1998) (holding that plaintiff's claims are barred by res judicata because the sparse new allegations are insufficient to construe independent grounds for suit"). Res Judicata requires the following three factors (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privities, and (3) a subsequent suit based on the same cause of action * 5. Board of Trustees of Trucking Employees of North Jersey Welfare Fund Inc. v Centre 980 F2d 495, 504 (3rd Cir 1992) (res judicata gives dispositive effect to a prior judgment if a particular issue, although not litigated, could have been raised in the earlier proceeding), see also ProtoComm Corp. v Novell Inc. & Novell Multimedia Inc., 1998 WL 351605, at *4 (E.D. Pa June 30, 1998) (the court held that the claims of ProtoComm against Fluent and Novell are essentially similar to the claims made in the first lawsuit and that res judicata bars ProtoComm's attempt to add these same claims to its complaint in the second case).

* 5. "All facts, allegations, and legal theories which support a particular claim, as well as all possible remedies and defenses, must be presented in one action or are lost." 18 James Wm Moore et. al., Moore's Federal Practice @ 131.01 (3rd ed. 1998) (emphasis added).

Analyzing the factors described above, Olick's suit is clearly barred by the doctrine of res judicata. Specifically, with regards to the first factor, Olick's previous claim was subject to a final adjudication on the merits *6. With regards to the second factor, there is the identity of parties sufficient to bar relitigation of Olick's claim. The Court of Appeals for the Third Circuit noted that "res judicata may be invoked against a plaintiff who has previously asserted essentially the same claim against different defendants where there is a close or significant relationship between successive defendants. " Gambocz v Yelencies 468 F 2d 837, 841 (3d Cir 1972). Goldberg 869 F. Supp 328, 300 (3d Cir 1994) (citing Alvins v Moll, 610 F Supp 308, 316 (E.D. Pa 1984). *7 Res judicata "will not be defeated by minor differences of form, parties or allegations" where the "controlling issues have been resolved in a prior proceeding in which the present parties and the opportunity to appear and asset their right." Williams 1998 WL 634893, at *2 (quoting Zhang v Southeastern Fm, Group Inc. 920 F Supp 787, 794 (E.D. Pa. 1997) (citations omitted).

* 6. See supra note 2.

* 7. The Alvin Court explained that "a (p)arty may not bring a cause of action, lose, and then bring essentially the same cause of action against identical or closely related parties without encountering res judicata." see id. 610 F Supp at 316.

Each party named in this suit was either a named party or in privity with a named party from the previous suit. Olick contends that his claims involve different legal theories. However, he fails to realize that these claims arise out of the same factual events and from the same "cause of action." Hancock I involved Olick and various Hancock entities. *8 The court disagrees with Olick and determines his current claims arise out of the same facts as the prior action.

The relationship between the causes of action in each suit is sufficient enough to pass the Third Circuit's transactional approach used in determining the application of res judicata. In each case Olick is attempting to relitigate the same claims alleged in Hancock I. "The court should not focus on a mechanical application of the res judicata rest but rather in its ultimate purpose of requiring a (party) to present all claims arising out of the same occurrence in a single suit." Board

* 8. Larry Carter not being named as an individual in the prior action is irrelevant. Mr. Carter was at all relevant times an employee of John Hancock Distributors Inc. and any alleged liability of Mr. Carter arises through his employment. See Lubrizol Corp. v Exxon Corp. 929 F 2d 960, 966 (3d Cir 1991) (stating that res judicata may be invoked against a party who has previously asserted essentially the same claims against different parties where there is a close or significant relationship between successive parties) (emphasis added).

of Trustees, 983 F 2d at 504. It is clear that the (parties) claim may not be pursued a second time. See Davis v United States Steel Supply etc. 688 F 2d 166, 174 (3d Cir 1982) (holding that the purpose of res judicata is to preserve judicial resources, avoid repetitive litigation, and encourage parties to plead all grounds for relief in a single lawsuit). The court should look to whether the acts complained of and the demand for relief are similar, whether the theory for recovery is the same, whether the witnesses and documents necessary at the trial stage are the same, and whether the material facts alleged are the same. see also Greenberg 869 F Supp at 331 (applying transactional test and looking whether " each lawsuit's factual basis arises from the same events and occurrences"). There is no evidence or claim presented now that could not have been presented at the first proceeding. Thus, the third test is satisfied and res judicata operates to bar action. See Herbert v Reinstein 976 F Supp 331, 339 (E.D. Pa 1997).

The present scenario does not raise difficult issues of the res judicata effects of prior judgments. The court determines that this ~~is a~~ straight forward attempt to relitigate specific claims that have been dealt with and decided against Olick. For the reasons set forth above, Hancock's Motion for Summary Judgment will be Granted.

By the Court:

/s/
Edward N. Cahn, C.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS W OLICK Plaintiff EDISON DIPPEL et. al. Defendants	CIVIL ACTION 93-1495

ORDER

Cahn C.J. November 26, 1993

AND NOW, this 26th day of November, 1993, upon consideration of defendants' motion to Compel Arbitration and the responses, It is Ordered that the Motions are GRANTED. Pursuant to 9 U.S.C. @ 4, all parties hereby ORDERED to arbitrate this dispute according to the terms of the arbitration agreement. Any such arbitration shall occur within this jurisdiction. Pursuant to 9 U.S.C. @ 3, this action is hereby STAYED pending the outcome of the arbitration. The Clerk is directed to place the within-numbered case in suspension file. *1

By the Court:
/s/
Edward N. Cahn, Chief Justice

entered 11/29/93

* 1. This case is a civil action pursuant to the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. @@ 1961-1968 ("RICO"). The plaintiff's claim arises out of alleged transactions that occurred while he was employed by John Hancock Distributors Inc. ("John Hancock"), a securities broker. In

order to become registered representative of John Hancock, the plaintiff was required to sign a form that included, in relevant part, an agreement to arbitrate certain types of claims. Such arbitration would be conducted by the National Association of Security Dealers ("NASD").

Currently before the court is the defendants' motion to compel the plaintiff to arbitrate his claims pursuant to the agreement and the Federal Arbitration Act ("FAA"), 9 U.S.C. @ 1 et. seq. The plaintiff does not dispute that he is bound to the arbitration clause. He does not refute the defendants' argument that his claims are subject to arbitration under that clause. Rather, the plaintiff merely informs the court that he is commencing a related class action suit. Such a class action, plaintiff contends, is not subject to arbitration under the NASD rules.

This court has no opinion regarding whether plaintiff's proposed class action is subject to arbitration. The court finds no support for denying a motion to compel simply because the action that is subject to arbitration is related to another action that is not. To the contrary, the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement." Moses H. Cone memorial Hospital v Mercury Construction Corp. 460 U.S. 1, 20 (1983). (emphasis in original).

In cases like the one at bar, where the parties do not dispute the existence of a binding agreement, a district court's inquiry is very limited. As a threshold matter, it must be determined whether the FAA governs the dispute in

this case. Three conditions must be present in order for the FAA to apply. First, the agreement to arbitrate must be contained in a "contract evidencing a transaction involving commerce." (U.S.C. @ 2. The contract here authorizes the plaintiff to conduct commerce on behalf of a registered securities broker and, as such, "involves commerce."

Second, under U.S.C. @ 4, a district court can compel arbitration only in cases where it "would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue." Moses H. Cone Memorial Hosp. 460 U.S. at 25 n 32. In this case, the court has subject matter jurisdiction pursuant to 28 U.S.C. @ 1331, because some of the claims are predicated upon RICO, 18 U.S.C. @ 1961 et. seq. Thus, an independent jurisdictional basis exists.

The final threshold requirement is that the movant must be a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement." 9 U.S.C. @4. By commencing suit in this court, rather than initiating the arbitration that the defendants allege is mandatory, the plaintiff has demonstrated a failure to arbitrate. Thus, this court finds the movants are "aggrieved parties."

Since the parties do not dispute the fact of a binding agreement, this court's function is confined to a "limited review to ensure that the dispute is arbitrable." Paine Webber Inc v Hartmann 921 F 2d 507, 511 (3d Cir 1990), any doubts concerning the scope of arbitrable

issues are resolved in favor of arbitration. Moses H. Cone Memorial Hospital 460 U.S. at 24-25; Trott v Paciolla 748 F Supp 305, 308 (E.D. Pa 1990). This court starts with a "presumption of arbitrability," on that it must compel arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." AT&T Technologies v Communications Workers of Am. 475 U.S. 643, 650 (1986); Paine Webber 921 F 2d at 511.

The arbitration clause at issue here is contained in the plaintiff's "Uniform Application for Securities Industry Registration" ("U-4"). The plaintiff completed and signed the U-4 in order to register with the NASD as an "Investment Company and Variable Contracts Products Representative" for John Hancock. Page 4 of the U-4 contains the following clause:

> 5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitution, or by laws of the organization with which I am registered.

The plaintiff has registered with the NASD. The NASD Code of Arbitration Procedure ("NASD Code") provides that it is:

> prescribed and adopted ... for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of this Association, with the

exception of disputes involving the insurance of any member which is also an insurance company:

> (1) between or among members
> (2) between or among members and public customers, or others ...
>
> NASD Code @ 3701

The following allegations in the plaintiff's complaint support a finding of arbitrability in this case. The plaintiff has alleged that, in his capacity as a duly authorized broker for John Hancock, he sold insurance policies and securities to Edison Dippel ("Edison"), Jean Dippel ("Jean"), Wayne Dippel ("Wayne"), and Wayne Griffiths ("Griffiths"). Edison and Jean registered a customer complaint against the plaintiff with John Hancock. The complaint against Olick was part of an alleged conspiracy that involved Edison, Jean, and defendant Thomas Nikles, who is also a registered securities broker for John Hancock. He further alleges that Nikles urged and assisted the Dippels to make the complaint. As part of the alleged conspiracy, Edison and Jean purchased securities and insurance from Nikles with the proceeds of the money they received from John Hancock. The remaining defendant, Patsy LaRosa, is an accountant. LaRosa allegedly joined the conspiracy with the other defendants when he agreed to prepare intentionally false and fraudulent tax returns for them.

The relationship between the parties arises out of the plaintiff's and defendants' connections with John Hancock. Thus, it initially appears that the U-4 arbitration clause covers this

dispute. However, the U-4 clause refers this court outside the U-4 to the NASD rules for further limits on scope. The NASD Code excludes "disputes involving the insurance business of any member which is also an insurance company." As noted above, the plaintiff's complaint contains allegations that insurance policies were sold in furtherance of the conspiracy. Accordingly, the question arises whether the NASD insurance exclusion forecloses arbitration of the instant dispute.

The parties do not address this issue and the NASD Code does not give further guidance on when a dispute "involves" the insurance business. A plaint reading of that language indicates that, for the exclusion to apply, the insurance must concern John Hancock and its "insurance business" Prudential Insurance Co of Am v Shammas, No 1:93:cv:395, 1993 U.S. Dist Lexis 15835, *9 (W.D. Mich September 14, 1993) (construing that same provisions). The instant dispute, however, relates to John Hancock's insurance business only incidentally and peripherally in that insurance policies were sold and bought in furtherance of the larger conspiracy. To the extent that the insurance exclusion creates a doubt about arbitrability, that doubt is resolved in favor of arbitration. This court cannot say, with the requisite "positive assurance," that the dispute falls outside the scope of the arbitration clause and, therefore, will grant the defendants; motion.

The FAA dictates that this court must order arbitration according to the terms of the agreement and stay the

PUBLISHER'S NOTE:

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proceedings in this court pending the outcome of the arbitration. 9 U.S.C. @@ 3, 4. That arbitration must occur within this judicial district. 9 U.S.C. @ 4 Econo-Car Int'l Inc. v Antilles Car Rentals Inc. 499 F 2d 1391, 1394 (3d Cir 1974). It is so ordered.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS W OLICK and KATHRYN A OLICK Debtors	Case No 96-22123

ORDER

AND NOW, this 29th day of April, 1997, upon consideration of Debtors' Motion to Appoint Counsel in the Adjudication of Debtors' bankruptcy Estate Claims in NASD Arbitration 94-05051 and 96-01247, and after hearing on April 10, 1997, and upon review of the submissions by Debtors on April 22, 1997 of the information which this Court directed Debtors to file (see Bench Order of 4/10/97), it is ORDERED:

1. The aforesaid application is hereby deemed to be an application under 11 U.S.C. @ 327(e), requesting retention of Special Counsel;

2. All Objections to said Application are overrruled and dismissed;

3. Since the "disinterestedness" test of @327(a) does not apply to application under @327(e), and since I find William C. House, Esquire holds no interest adverse to the Debtor's estate, I conclude that he is not prohibited from providing legal representation to Debtors in the Arbitration matters referred to above merely because he holds a pre-petition claim of $4,634.85 for un-reimbursed costs and expenses related to his prior representation of Debtors in Arbitration proceedings against John Hancock Distributors Inc. (see Collier on Bankruptcy), @327.04(9((b), 15th Ed. Revised, In re Statewide Pools Inc. 79

B.R., 312 B.R. 312 (Bankr. S.D. Ohio 1987); In re G&H Steel Services Inc. 76 B.R. 508 (Bankr E.D. PA 1987);

4. The said application is therefore GRANTED;

5. William C. House Esquire shall file the required application for fees and/or expenses which will be subject to Court for approval after notice and hearing.

/s/
Thomas M Twardowski
Bankruptcy Judge

Reading, Pa.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No 97-1956

JOHN HANCOCK DISTRIBUTORS INC.
JOHN HANCOCK MUTUAL LIFE INS. COMPANY
LARRY CARTER
APPELLANTS

v

THOMAS W OLICK

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-cv-04460)

Submitted Under Third Circuit LAR 34.1(a)
June 4, 1998

Before: SCIRICA, NYGAARD and SEITZ
Circuit Judges

(Filed: August 10, 1998)

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OPINION OF THE COURT

Seitz, Circuit Judge

This appeal presents the question of whether, under the Federal Arbitration Act, 9 U.S.C. @@ 1-16 (the "FAA" or the "Act"), a district court has the authority , not withstanding a valid arbitration clause, to enjoin a party from pursuing arbitration on res judicata grounds arising from both a prior arbitration and a prior judgment. The district court exercised diversity jurisdiction pursuant to 28 U.S.C. @ 1331 based on the alleged violations of the securities laws. Because the issues raised in the context of this appeal are purely legal, our standard of review is plenary. See Smith v Magras 124 F 3d 457, 460-61 (3d Cir 1997).

1. Facts and Procedural History

On October 13, 1992, John J, Carroll and others sued John Hancock Distributors Inc. ("Hancock") and eighteen other defendants in Carroll v Hancock, 92-cv-5907 (E.D. Pa 1995). The complaint alleged violations of several federal and state statutes, along with various common law fraud theories, in connection with a series of limited partnership transactions. Thomas W Olick ("Olick"), a former employee of Hancock and a registered life insurance agent, was a named defendant in the Carroll action. Olick attempted to assert a cross-claim against Hancock in the Carroll litigation, but the district court denied the claim in its entirety. The case was closed on November 30, 1994.

During the pendancy of that litigation, Olick filed, on December 2, 1992, a Statement of Claim with the National Association of Securities

Dealers ("NASD") against Hancock, demanding the arbitration of disputes relating to certain limited partnership transactions - the same transactions to Hancock, that were the subject of the Carroll action. The NASD on February 28, 1995, issued an arbitration award in favor of Olick and denied a number of third party claims asserted by Hancock. The record does not show that Hancock objected to the 1992 NASD arbitration based on the existence of the then preceding Carroll litigation.

On May 4, 1996, after the conclusion of both the Carroll case and the 1992 NASD arbitration, Olick filed with the NASD another Statement of Claim against Hancock seeking the arbitration of claims sounding in fraud, misrepresentation, slander, libel and RICO violations. In response, Hancock moved the arbitration panel to dismiss this claim based on the res judicata effect of the prior 1992 arbitration award and the judgment rendered in the Carroll action. Hancock in particular argued that Olick's 1996 Statement of Claim arose from the same factual circumstances as the previous arbitration in 1992 as well as the prior federal judgment, and therefore principles of res judicata barred Olick from raising a claim that could have been raised at either the prior arbitration proceeding or the Carroll litigation. The arbitration panel on February 11, 1997, denied Hancock's motion to dismiss without a hearing or a discussion of the merits. So far as we are aware, that proceeding is still pending.

Before the arbitration panel had denied Hancock's motion to dismiss the second arbitration, Hancock filed a

complaint in the district court seeking a declaration that the claims raised by Olick in the 1996 arbitration were barred in res judicata grounds. Hancock also filed a motion in the district court seeking to preliminarily enjoin the NASD from further proceedings in resolution of the 1996 arbitration. The district court, however, denied Hancock's motion and dismissed its complaint, holding that under the Federal Arbitration Act the arbitrator, and not the court, decides preclusion issues. While the district court what was, in its view, an absence of third circuit case law directly on point, it found persuasive a line of cases holding that courts are not to rule on the validity of various defenses in arbitration. See Conticimmodity Services Inc. v Phillip & Lion, 613 F2d 1222, 1223 (2d Cir 1980) (timeliness of demand directed by arbitrator): North River Ins CO. v Allstate Ins Co 866 F Supp 123, 129 (S.D.N.Y. 1994) (res judicata decided by arbitrator).

In its order denying Hancock's motion for reconsideration, the district court determined to apply case law holding that courts, and not arbitrators, are to decide res judicata issues stemming from a prior judgment rendered by federal court. The district court found those cases distinguishable because they failed to address what it viewed as a `hybrid' situation raised - namely, `whether an arbitrator or a federal court should determine the res judicata effect of both a prior arbitration and a prior federal court decision on an arbitration claim." D Ct Order Nov 11, 1997, at 2 (emphasis in original). Hancock now appeals the district court dismissal of

its complaint and the denial of its motion for a preliminary injunction.

II. Appellate Jurisdiction

As a preliminary matter, Olick contests this courts jurisdiction to entertain this appeal. Section 16 of the FAA governs the appealability of district orders with respect to arbitration and provides:

(a) An appeal may be taken from -
(1) an order -
(A) refusing to stay of any action under section 3 of this title.
(B) denying a petition under section 4 of this title to order arbitration to proceed.
(C) denying an application under section 206 of this title to compel arbitration.
(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award;
(2) an interlocutory order granting, continuing or modifying an injunction against an arbitration that is subject to this title; or
(3) a final decision with respect to an arbitration is subject to this title.

9 U.S.C. @ 16(A). The general approach to appellate jurisdiction as set forth in the FAA is constrained: the ACT typically precludes appellate review of orders allowing arbitration "until after the arbitration process has gone forward." Stedor Enterprises Ltd v Armtex Inc. 947 F 2d 727, 720 (4th Cir 1991): see also

David D. Seigal Practice Commentary 9 U.S.C.A. @ 16 at 352 (West Supp 1997). Nevertheless, the FAA specifically states that any "final decision with respect to an arbitration" is immediately appealable, 9 U.S.C. @ 16(a)(3), regardless of whether that decision allows the arbitration process to go forward. See Seigal supra at 352. Thus, the answer to the immediate question in considering appellate jurisdiction critically turns on whether the district court orders were "final" or "interlocutory," and consequently subject to the jurisdictional hurdles set forth in section 15(b). See American Cas. Co. of Reading v L.J. Inc. 35 F 3d 133, 136 (4th Cir 1996).

Congress did not define a "final decision" for the purposes of this section, and therefore we look to prior settled usage of the term. A final decision, as that term is commonly understood for purposes of appellate jurisdiction, refers to an order that "ends the litigation on the merits and leaves nothing for the court to do but to execute the judgment." Ortiz v Doge 126 F 3d 545, 547 (3d Cir 1997) (quoting Catlin v United States 324 U.S. 229. 233 (1945)). Within the context of orders relating to arbitration , the decisive issue is "whether arbitrability was the sole issue presented in the action or whether the issue of arbitrability originally as part of an action raising other claims for relief." American Cas 35 F 3d at 136: see also F.C. Schafer & Ass. v Demech Contractors Ltd 101 F 3d 40, 41 (5th Cir 1996). If the arbitration issue arises in what is known as an "embedded proceeding" - that is embedded in some

broader context raising issues or claims for relief outside the arbitration context - then the district court order addressing arbitration cannot be considered a final order subject to immediate appeal under section 16(a)(3) and the appellant must search for another avenue of appellate jurisdiction under section 16(a). See Siegal supra at 352. Conversely, an appeal from an "independent proceeding" raising solely arbitration issues with no other claims for relief falls under section 16(a)(3) as an appeal from a final order because the litigation before the district has effectively ended on the merits. Id. at 352-53. It matters not whether the district court decision favors arbitration or litigation. Id.

In this case, Hancock sought both legal and injunctive avenues for relief: a judgment declaring Olick barred from arbitration under the doctrine of res judicata, and an injunction halting the NASD from entertaining Olick's demand for arbitration. At first blush, it may be argued, as Olick seems to do, that Hancock's motion for a preliminary injunction is embedded within the broader complaint seeking a declaratory judgment, and hence the district court's denial of that injunction is not appealable under section 16(a)(3) or section (b) (4). Yet, there was only one issue before the district court, and that was whether Olick might properly seek arbitration of his claims against Hancock. When the district court decided that single issue in favor of arbitration, the litigation effectively ended, leaving nothing for the district court to do but enter judgment.

Accordingly, this independent proceeding before the district concluded in a final order and it therefore appealable under 9 U.S.C. @ 16(a)(3).

III. The Federal Arbitration Act

Having established our jurisdiction, we now turn to the merits of this appeal. Because this case raises questions about the scope of the duty to honor an arbitration agreement, our analysis must begin with the Federal Arbitration Act. The FAA federalizes arbitration law and "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate ..." Moses H. Cone Mem. Hosp. v Mercury Const. Corp. 460 U.S. 1. 25 n 32 (1983). The operative language in the Act, as provided in section two, states that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract.

9 U.S.C. @2. The parties agree that the arbitration agreement at issue falls within the ambit of the FAA.

Because the FAA enforces arbitration agreements as a matter of federal law,

the statute authorizes district court involvement in the arbitration process primarily in two ways. See Local 103 of the Int'l Union of Elec. Radio and Mach. Workers v RCA Corp. 516 F 2d 1336, 1339 (3d Cir 1975). One such function of the court arises when a party resists arbitration under an existing arbitration clause. In this case, the FAA allows a district court to compel or enjoin, arbitration as the circumstances may dictate. See 9 U.S.C. @@ 3, 4; PaineWebber v Hartman, 921 F 2d 507, 511 (3d Cir 1990). The other basics for court involvement is found when enforcement of an arbitration award is sought. Here, the statue authorizes the district court to confirm, vacate, or modify the award under a narrow scope of judicial review/ 9 U.S.C. @@ 9-11.

Beyond those two areas, the statute does not authorize court involvement in enforcing arbitration and we have consistently admonished the courts "to exercise the utmost restraint and to tread gingerly before intruding upon the arbitral process." Lewis v American Fed'n of State, County and Municipal Employees, 407 F 2d 1185, 1191 (3d Cir 1975). There is, of course, good reason for this restraint approach. Arbitration is, above all, a matter of contract and courts must respect the parties bargained-for method of dispute resolution. See Local 1545, United Mine Workers of Am. 876 F 2d 1288, 1293 (7th Cir 1989). Indeed, arbitration most often arises in areas where courts are at a significant experiential disadvantage and arbitrators, who understand the "language and workings of the shop" may best serve the interest of the parties. See United Steelworkers of

Am. v Enterprise Wheel and Car Corp. 353 U.S. 593, 596 (1950); RCA Corp. 516 F 2d at 1340. Thus, there is a strong policy in favor of arbitration and courts must resist the attempt to intrude upon arbitration proceedings were the statute does not explicitly authorize court intervention.

Turning to the district court's authority to enjoin arbitration, which is the heart of this dispute, we again explore the nature of the district court's involvement in the arbitration process. Here, the FAA states that a court may issue an order compelling arbitration only "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue" 9 U.S.C. @ 4, Starting with the familiar proposition that arbitration is a creature of contract, courts have long since drawn the conclusion that, as a matter of contract, no party can be forced to arbitrate an issue unless that party has entered into an agreement to do so. See AT&T Technologies v Communication Workers of Am. 475 U.S. 643, 648 (1986). Because the competence of an arbitrator stems exclusively from contact, a district court may only order, or enjoin, arbitration based o the agreement to arbitrate itself. id. This includes, as a matter of course, an exploration of whether the parties entered into a valid arbitration agreement in the first instance, and whether the specific dispute falls within the scope of that agreement. See In re Prudential Ins. Co. of Am. Sales Practice Litig. 133 F 3d 225, 228 (3d Cir 1998).

Thus, the threshold questions a

district court must answer before compelling or enjoining arbitration are these: (1) Did the parties seeking or resisting arbitration enter into a valid arbitration agreement? (2) Does the dispute between those parties fall within the language of the arbitration agreement? See in re Prudential 133 F 3d at 128, 133; PaineWebber 921 F 2d at 511. Absent a compelling federal policy to the contrary, see Shearson/American Express Inc. v McMahon, 482 U.S. 220 (1989), the sina qua non of arbitrability is simply stated: that a valid arbitration exists and the dispute falls within the contours of that agreement. in re Prudential 133 F 3d at 128. As we previously concluded, district courts need only "engage in a limited review to insure that the dispute is arbitrable - i.e. that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement. PaineWebber 921 F 2d at 511. In conducting the limited review, the court must apply ordinary contractual principles, with a healthy regard for strong federal policy in favor of arbitration. Moses H Cone Mem. Hosp. 460 U.S. at 24; in re Prudential 133 F 3d at 128.

A. The Res Judicata Dispute Between the Parties

As the district court recognized, this case represents somewhat of a "hybrid" situation in that Hancock's objection to arbitrating Olick's claims stems from both a prior arbitration and a prior federal judgment. Apparently, no case to date has addressed this precise factual complex., and we will analyze

each component of Hancock's position in turn.

1. Res Judicata Based on a Prior Federal Judgment

Notwithstanding the analysis discussed above, many federal courts have held as a matter of law that claims of res judicata based on a prior federal judgment must be decided by the district court before compelling or enjoining arbitration. See e.g. in re Y&A Group Sec. Litig. 38 F3d Fenner & Smith Inc. 985 F2d 1067, 1069 (11 Cir 1993); Miller Brewing Co. v Forth Worth Distrib. Co. 781 F2d 794, 499 (5th Cir 1986); see also Miller v Runyon, 77 F3d 189, 195 (7th Cir 1996) (collecting other cases). These courts typically reason that federal courts must protect the finality and integrity of prior judgments. See Kelly 985 F 2d at 1069, in re Y&A 38 F3d at 382. As succinctly stated by the Eleventh Circuit Court of Appeals, federal "courts should not have to stand by while parties re-assert claims that have already been resolved." Kelly 985 F2d at 1069. Because the FAA contemplates that an arbitration award may be enforced by judgment, see 9 U.S.C. @ 9, these courts would allow a district court to enjoin arbitration if the claims would be precluded under ordinary rules of res jud icata. Miller Brewing Co 781 F2d at 499.

Not all courts, however, have been persuaded by such logic. Most notably, the Second Circuit Court of Appeals has held that collateral estoppel defense to arbitration based on a prior federal judgment should be decided by an arbitrator because it is a merit based defense to arbitration. See United States Fire Ins, Co. v National Gypsum Co. 101 F

3d 813, 817 (2d Cir 1996). id. Whehter such a defense itself is arbitrable, like any other ambiguity in the scope of arbitration, must stem from the language of the arbitration agreement itself becasue arbitration is a matter of contract and a "defense based on isue preclusion effect of the prior jdgment is part of the dispute on the merits." id. Thus, the court reasoned, unless it may be said "with positive assurance" that the parties intended to place the collateral estoppel issue with the court, the viability of that affirmative defense must be decided by an arbitrator. id.

These competing considerations present the court with a high order challenge. On one hand, a realistic concern for the finality and integrity of judgments would arise if parties were free to ignore federal court decisions that have conclusively settled claims or issues now sought to be arbitrated. Yet, arbitration is a matter of contract and the FAA only allows a "limited review" of the parties dispute before compelling or enjoining arbitration. see PaineWebber 921 F 2d at 511. The issue is thoughtfully discussed in Miler v Runyon 77 F 3d 189, 193-94 (7th Cir 1996), but that court fell short of providing a comprehensive answer. In the final analysis, we conclude that with respect for a precedent of this court dictates that we must resolve the issue in favor of district court jurisdiction to decide the res judicata defense as it relates to a prior judgment. Thus, we stated in Telephone Workers Union of New Jersey v New Jersey Bell Tel. Co. 584 F 2d 31 (3rd Cir 1978):

The district court did not reach the

> merit of the Board of Arbitrators; intterpretation of the Collective Bargaining Agreement. It turned, first, to the judgment conclusion effect of the Consent Decree. This was the proper course. When a federal court is presented with the contention that a prior federal judgment determined issues now sought to be relitigated in an arbitration forum it must first determine the effect of the judgment. This is so whether the question arises in an action to compel on as here, in an action to enforce a disputed award. The federal policy favoring forum selection clauses, based in part on an institutional interest of federal courts in avoiding litigation, does not come into play until the court first determines whether prior completed litigation has already finally determined the issues.

id. at 32-33 (citation omitted). In that case, an aggrieved employee sought arbitration of a matter that had been conclus-ively settled by a consent decree entered by a federal district court. Arbitration had in fact rendered a result that confl-icted with the consent decree and the district court, in considering a motion to enforce the arbitrator's award, turned first to the issue preclusive effect of the consent decree. We affirmed on the principle that a federal judgment when faced with the possibility of relitigating issues already settled by that judgment. Moreover, we explicitly stated that this was the correct course regardless of whether parties seek to compel arbitration or confirm a disputed award.

The district court did not apply our

analysis on New Jersey Bell to this case because of the unique "hybrid" res judicata objection raised by Hancock - "hybrid" in the sense that Hancock's claim of preclusion stems from both a prior judgment and a prior arbitration. We find no principled reason underlying this distinction. When a party resisting arbitration bases its claim of res judicata not only on a prior judgment but also on the existence of a prior arbitration, the analysis must focus on each aspect of the claim, hybrid facts do not call for a hybrid analysis. To be sure, there may be a number of factual grounds to distinguish our holding in New Jersey Bell, but the legal principle announced in that case directly controls the issue presented before the district court - in particular, whether the arbitrator to a court must decide the preclusive effect of a prior federal judgment. Given the broadly worded language in that case, many courts have read New Jersey Bell as do we, for the proposition the federal courts must intervene in the arbitration process when faced with res judicata objections stemming from a prior federal judgment. See Aircraft Braking Systems Corp. v Local 856 Int'l Union, United Auto., Aerospace and Agric. Implements Workers 97 F 3d 155, 159 (6th Cir 1996); John Morrell & Co. v Local Union 304a of the United Food and Commercial Workers, 913 F 2d 544, 562 (8th Cir. 1990); American Trade Dispatchers Assoc. v Burlington N RR 784 F Supp 899, 903 (D.D.C. 1992). Thus, whether we honor our internal operating procedure governing the application of this court's precedent. see 3rd Cir IOP Chapter 9). ("(T)he

holding of a panel in the reported opinion is binding on subsequent panels.") (emphasis added), or apply the permissive language in New Jersey Bell, we conclude that the district court in this case should first decide the preclusive effect of the prior federal judgment as it relates to Olick's demand for arbitration before the NASD.

2. Res Judicata Based on the Prior Arbitration

The question remains, however, whether the district court, under the FAA, may consider the preclusive effect of the prior NASD arbitration as a basis for enjoining the current NASD precedent. We now turn to that issue.

As stated above, the judicial inquiry before compelling or enjoining arbitration is narrow, and the FAA authorizes the district court to explore only two threshold questions in considering a demand for arbitration: (1) Did the parties seeking or resisting arbitration enter into a valid arbitration agreement? (2) Does the dispute between those parties fall within the language of the arbitration agreement? See in re Prudential 133 F 3d at 128, 133; PaineWebber 921 F 2d at 511. While we have previously held that claims of res judicata based on a prior federal judgment are an exception, see Telephone Workers Union of New Jersey v New Jersey Bell Tel. 584 F 2d 31-32 (3rd Cir 1978), res judicata objections based on a prior arbitration do not implicate the institutional concerns underlying that holding. Therefore, the proper analytical inquiry mandated under the FAA is to

focus on both the existence of a valid arbitration agreement and the nature of that agreement as it relates to the parties' current dispute.

we have previously held, for example, that where there is a contractual provision barring the re-arbitration of similar disputes between parties, the arbitrator is to decide the preclusive effect, if any, of a previous arbitration. See Local 103 of the International Union of Elec., Radio, and Mach. Workers v RCA Corp. 516 F 2d 1336, 1340 (3d Cir 1975). The reasoning underlying this approach is that a provision regarding the finality of arbitration awards is a creature of contract and, like any other contractual provision that is the subject of a dispute, it is within the province of arbitration unless it might be said "with positive assurance" that the parties sought to have the matter decide by a court. Id. Although the contractual provision before the RCA court specifically stated that "in no event ... shall the same question or issue be the subject of arbitration more than once," this court approved the same reasoning when faced with a broader agreement between the parties that arbitration awards are "final and binding." id. at 1341; see also Local 616 International Union of Elect., Radio, and Mach. Workers v Boyd Plastics Inc. 428 F 2d 23, 25 (3d Cir 1970).

The parties arbitration agreement in this case may be found in the "Uniform Application for Securities Industry Registration," ("Form U-4") signed by Olick, which submits to the NASD "any dispute, claim or controversy that may

arise between me and my firm, or a customer, or another person, that is required to be arbitrated under the rules, constitution or by-laws of the organization with which I am registered." Form U-4 & 5. The NASD Code of Arbitration Procedure provides for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, with the exception of disputes involving the insurance business of any member which is also an insurance company ..." NASD Code of Arbitration Procedure @ 3701). The parties do not contest the validity of the arbitration agreement here nor do they dispute that Olick's claims raised before the NASD properly fall within the scope of the arbitration clause. Indeed, both Olick and Hancock explicitly agreed to "submit the present matter in controversy, as set forth in the ... statement of claim, answer, cross claim and all related counterclaims and/or third party claims which may be asserted, to arbitration ..." NASD Uniform Submission Agreement @1 Def.'s App at 1. The only remaining question, therefore, is whether the parties intended the current controversy - whether the prior NASD award precludes Olick from asserting his claims - to be arbitrated as well.

The arbitration procedure agreed to here, as incorporated in the arbitration agreement, states that all arbitration awards are to be "final and not subsequent to review on appeal." NASD Code of Arbitration Procedure @ 10330(b). Moreover, the parties agreed that "arbitrators shall be empowered to interpret and determine the applicability

of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s)." id 10324. The NASD Code of Arbitration Procedure further provides that "(s)uch interpretations and actions to obtain compliance shall be final and binding upon the parties." id.

Given this language, we must conclude that Hancock's res judicata objection based on a prior arbitration is an issue to be arbitrated and is not to be decided by the courts. The procedural rules quoted above no doubt demonstrates the parties' intentional adherence to a binding principle of finality similar to res judicata applied to arbitration awards rendered by the NASD. It is equally quite clear from the arbitration procedure adopted here that the parties intended the NASD, and not the district court, to determine the nature and extent, if any, of the finality. Accordingly, the district court correctly declined to decide Hancock's res judicata objection based upon the prior NASD award.

IV. Conclusions

For the reasons stated in this opinion, we will reverse the order of the district court dismissing the complaint and denying the preliminary injunction to the extent that it provides tat Hancock's res judicata defense based upon a prior judgment is an issue for the resolution by the arbitrator. We, of course, express no opinion on the merits of that affirmative defense. To the extent the order of the district court dismissed Hancock's res judicata defense based on the prior arbitration, we shall affirm.

Accordingly, this case will be remanded for such further proceedings as may be appropriate.

A True Copy: Teste

Clerk of the United States
Court of Appeals for the Third
Circuit

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No 98-2178 and 99-1123 *1

JOHN HANCOCK DISTRIBUTORS INC.
JOHN HANCOCK MUTUAL LIFE INS. COMPANY
LARRY CARTER
v
THOMAS W OLICK
APPELLANT

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-cv-04460)
District Judge: Hon. Edward N. Cahn, Chief Judge
Hon. James T. Giles

Submitted Under Third Circuit LAR 34.1(a)
August 2, 1999

Before: Becker, Chief Judge, McKee and Cowen, Circuit Judges

(Filed: September 10, 1999)

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*1. Consolidated by order of the Clerk dated May 14, 1999

OPINION

PER CURIAM

Thomas W Olick appeals from the District Court's order granting the plaintiff's motion for summary judgment. For the reasons that follow we shall affirm the District Court's order.

I.

In 1992 John J Carroll and others sued John Hancock Distributors Inc. and eighteen other defendants in connection with a series of limited partnership transactions. Carroll v Hancock, 92-cv-5907 (E.D. Pa. 1995). Olick, one of the defendants in the action and a former employee of Hancock, moved to assert a cross-claim against Hancock alleging RICO and other violations, but the District Court denied the motion as untimely and meritless. Olick did not appeal.

While the action was pending Olick filed a Statement of Claim with the National Association of Security Dealers against Hancock demanding the arbitration of disputes related to certain limited partnership transactions. In 1995 the NASD issued an arbitration award in favor of Olick and denied a number of third party claims asserted by Hancock. In May 1996, after both the Carroll case and the arbitration action were concluded, Olick filed with the NASD another Statement of Claim against Hancock seeking the arbitration of claims sounded in fraud, misrepresentation, tortous interference with business relations, slander, and

libel, and alleging RICO violations. In response, Hancock sought dismissal of the claims based on the res judicata effect of the prior arbitration award and the judgment in Carroll.

The arbitration panel denied the motion, but before it did so, Hancock filed a complaint in the District Court seeking a declaration that the claims raised by Olick in the 1996 arbitration were barred as res judicata. Hancock also filed a motion to enjoin the NASD from further proceedings with regard to the 1996 arbitration. The District Court denied the motion and dismissed the complaint, holding that under the Federal Arbitration Act the arbitrator, not the court, decides preclusion issues.

On appeal, we reversed the District Court's order to the extent that it provided that Hancock's res judicata defense based on the prior judgment in Carroll was an issue for resolution by the arbitrator, affirmed to the extent that the order dismissing Hancock's res judicata defense based on the prior arbitration, and remanded for further proceedings. John Hancock Mutual Life Insurance Com. 151 F 3d 132, 140 (3d Cir 1998).

On remand, Hancock filed a motion for summary judgment, arguing that the claims Olick raised in the arbitration were barred by the final judgment in Carroll because the claims and factual circumstances out of which they arise are identical to claims previously litigated in that action. Applying the familiar three part test - there must have been a final judgment on the merits in a previous action involving the same parties or their privities and the same

cause of action - the District Court agreed. Olick's previous claims were subject to a final adjudication on the merits in Carroll; the parties were sufficiently identical; each party was either a named party or in privity with a named party in Carroll' and while the claims may involve different legal theories, they arise out of the same factual events and from the same cause of action, and there are no claims presented now that could not have been presented in Carroll.

Olick timely filed notice of appeal. A week later, he filed another notice of appeal; the two appeals have been consolidated for purposes of briefing and disposition.

II.

Olick argues that res judicata does not apply because the factual predicates of some of his claims post-date, and thus could not have been presented in Carroll. First, Olick contends that one of the claims in the second arbitration is that the appellees defamed him in a series of U-5 forms, some of which were not issued until 1996. Second, he contends that two of his claims are for malicious prosecution in the NASD proceedings. The first concerns appellee's indemnity claims, a final order denying which was not issued by the Arbitration panel until September 1995. The second concerns appellee's attempts to collect assigned claims in Olick's two bankruptcy actions, which Olick did not discover until December 1996 and March 1997. There is no merit to this argument. We have read all two hundred and one paragraphs of

Olick's pending arbitration claim but can find no reference in it or to any such malicious prosecution claims. The closest reference we can find to allegations of defamation in U-5 forms is @ 65, which merely refers to "misrepresentation," not defamation, and provides no dates when these misrepresentations were allegedly made; the claims makes no reference to the amended U-5 forms which Hancock filed in 1996, yet alone alleges that they were defamatory.

While Olick is proceeding pro se, he is a sophisticated litigant and it is not for the Court to plumb the depths of the appendix to come up, on his behalf, with claims he cannot take the trouble to clearly state for himself. Read at face value, his NASD complaint does not state a claim for defamation (misrepresentations without more is not defamation) with regards to the U-5s, let alone a claim that defamatory statements were made at such a time that would prevent res judicata from applying.

Olick also argues that he could not have brought his claims in Carroll because doing so would have violated the arbitration agreement. However, not only does Olick fail to explain why presenting his claims would have violated the arbitration agreement, his argument is undermined by the fact that he tried to bring some of his claims in Carroll via a cross-claim. That fact similarly undermines his contention that the claims could not have been brought in Carroll in light of the bankruptcy action, a contention which is meritless because on April 14, 1994, the Bankruptcy Court lifted the stay so that the litigation against Olick could go forward; indeed,

after the stay was lifted Olick filed a motion to file "an Amended Answer, Counter Claims, Cross Claims and to add Additional Parties."

Because we find these and the remainder of Olick's arguments on appeal unpersuasive, and becasue agree with the reasons given by the District Court for granting the motion for summary judgment, we shall affirm the District Court's order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

John J Carroll Jr.	CIVIL ACTION
v	No 92-cv-5907
John Hancock Distributors et. al.	

ORDER

AND NOW, this 24th day of June, 1994, after considering defendant Thomas W Olick's "Request for Permission" to "file Third Party Clams against 20 proposed third party defendants, and to file cross claims against defendant Joseph DiMento and John Hancock Distributors, Inc.,

It is hereby ORDERED and DECREED that Olick's Request for Permission/ Motion for Leave to file third party claims and cross claims is denied. *1

By The Court:
/s/

F.S. Van Antwerpen

*1. The motion is untimely and lacks merit.

Entered 6/27/94

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

John J Carroll Jr.	CIVIL ACTION
v	No 92-cv-5907
John Hancock Distributors et. al.	

ORDER

AND NOW, this 24th day of June, 1994, in consideration of defendant Thomas W Olick's Motion for Leave/Permission to File an Amended Answer to Plaintiff's Second Amended Complaint, the Court hereby Grants this Motion. *1

/s/
Judge
F.S. Van Antwerpen,
U.S. District Judge

*1 The answer shall comply with our other order issued this day in which we denied defendant's request to file third party claims. If necessary we shall enforce this order with sanctions.

Entered 6/27/94
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

John J Carroll Jr., Patricia L. Klassen and Marlin Stock v John Hancock Distributors Inc., Capital Management Group, Capital Management Group Inc., Capital Management Group of Allentown, G&O, a partnership, Lexco Operating Company, J.D. Webster, Progas Inc., Daniel Polk Baytide Petroleum, Inc. Warren F. Young, DiMento General Agency, Joseph DiMento, Thomas W Olick, Joseph M. Corby	CIVIL ACTION No 92-cv-5907

ORDER

AND NOW, this 2nd day of February 1994, defendant Olick's pro se Motion for Leave to File Counter and Crossclaims filed January 3, 1994 is DENIED. Accordingly, plaintiff's Motion to Strike Defendant Olick's Counterclaims filed December 17, 1993 is GRANTED. Under Fed. R. Civ. P. 7(a) a counterclaim or a crossclaim mist be part of an answer. Defendant Olick has never filed an appropriate answer to plaintiff's Second Amended Complaint even though we expressly ordered him to do so within twenty days of our Order of October 13, 1993.

BY THE COURT
/s/
Franklin S Van Antwerpen, U.S.D.J.

NATIONAL ASSOCIATION OF SECURITY DEALERS

THOMAS W. OLICK Claimant vs. John Hancock Distributors Inc., John Hancock Mutual Life Ins. Co., Profesco, Corp., Joseph DiMento, DiMento General Agency, John Hancock Variable Life Insurance Co., Quantum Financial Group Inc., Quantum Insurance Associates, Inc., Anne Buckley, Kimberly Spense, Larry Carter Respondents	NO. 96-01247

STATEMENT OF CLAIMS

Claimant Thomas W Olick, hereinafter referred to as Olick, files this Statement of Claims as follows;

1. Parties

a) Thomas W Olick is an adult individual residing at 4014 Crestview Ave, Easton Pa 18045 and is a registered agent with the NASD.

b) Joseph DiMento is an adult individual who resides at 1790 Flint Hill Rd., Coopersburg, Pa. Mr DiMento is registered with the NASD.

c) John Hancock Distributors Inc., hereinafter referred to as Distributors, is a registered Broker Dealer with the NASD and maintains a Corporate office at P.O. Box 111, Boston, Ma. 02117.

d) John Hancock Mutual Life Insurance Company, hereinafter referred to as Hancock, is the parent company of Distributors and may be served at the same address.

e) Profesco Corporation is a wholly owned subsidiary of Hancock and may be served at the same address. Profesco is believed to be registered with the NASD.

f) John Hancock Variable Life Insurance Co., is a wholly owned subsidiary of Hancock and may be served at the same address.

g) The DiMento General Agency is the Hancock general agency in Allentown Pennsylvania, which was formerly called the Allentown General Agency and which was previously wholly owned by Hancock until its purchase by DiMento sometime in the late 1980's. The DiMento General Agency is located at 1259 S. Cedar Crest Blvd, Allentown, Pa, 18103.

h) Quantum Financial Group Inc. and Quantum Insurance Group Inc. are corporations owned wholly and/or in part, by Joseph DiMento and/or Hancock, and which are believed to be registered with the NASD as Registered Investment Advisors. These corporations are located at the aforementioned offices of Joseph DiMento and the DiMento General Agency.

i) Anne Buckley is an adult individual who resides in Boston and at all times

relevant, was employed as a supervisor of the Compliance Department of Distributors. It is believed that Ms Buckley is registered with the NASD.

j) Kimberly Spense is an adult individual who resides in Boston and, at all times relevant, was employed as a Compliance Technician at Distributors.

k) Larry Carter is an adult individual residing in Boston and at all times relevant, was employed as a Compliance Technician and/or a supervisor at Distributors. It is believed that Mr Carter is registered with the NASD.

II. Individual Allegations

1. At all times relevant, Thomas Nikles was an agent, employee, Sales Manager, Assistant General Agent, Sub-Franchisee and/or Registered Agent associated with the Allentown General Agency, the DiMento General Agency, Profesco Corporation, John Hancock Mutual Life Insurance Company, John Hancock Variable Life Insurance Co., Quantum Financial Group Inc. and/or Quantum Insurance Associates, Inc.

2. At all times relevant, Olick was an agent and/or registered representative of the Allentown General Agency, the Joseph DiMento General Agency, a sub-franchisee of Profesco, John Hancock Mutual Life Insurance Company, John Hancock Variable Life Insurance Company and/or John Hancock Distributors Inc.

3. At the start of their employment and

at all times relevant hereto, Thomas Nikles and Thomas Olick each had executed agent contracts with Hancock, John Hancock Variable Life Insurance Company, Distributors, Profesco, the Allentown General Agency, and the DiMento General Agency.

4. The Distributors contracts signed by Olick and Thomas Nikles contained various provisions, one of which required Nikles and Olick to employ Distributors' Marketing Materials, and/or materials authorized by their employers, as the basis of their presentations in the sale of securities to their clients.

5. Olick employed the sales and marketing materials authorized and/or provided by Distributors in the sales of securities to his clients.

6. These aforementioned sales and marketing materials included representations that various limited partnerships had "safety of principal", were "low risk", were "100% insured" and other similar statements designed to impart understanding to the agents and/or clients concerning the risk level of the investments.

7. In April 1991, in a dispute with Defendant DiMento, Olick was terminated by DiMento from the DiMento General Agency and subsequently by Hancock, who refused to allow Olick to become associated with another General Agency of Hancock.

8. Thereafter, Distributors mailed to Olick a letter stating that, because of the aforementioned termination, his contract was also being terminated by Distributors.

9. Olick's Contract with Distributors did not require him to be associated with DiMento and/or Hancock.

10. At the time he was terminated by DiMento, Olick had a police officer to come to the DiMento General Agency because DiMento was forcibly preventing Olick from leaving the premises and was assaulting Olick. Olick did not respond in kind to the physical assaults of DiMento.

11. At the aforementioned confrontation, DiMento averred to Olick that DiMento would arrange it so Olick "would never work in the financial service industry again."

12. At the time of his termination, DiMento had withheld various commission checks from Distributors and Hancock, which were made payable to Olick. Subsequently, DiMento deducted from these commissions various unauthorized expenses and other items without the consent of Olick.

13. Olick complained to Distributors and Hancock concerning the above, but Hancock and Distributors supported and consented to the aforementioned actions of DiMento.

14. Within days of Olick's termination,

Nikles approached various clients of Olick, including, but not limited to, George Paybins and Mr Keller. Nikles averred to these clients that Olick would never be allowed to work in the financial services industry and made other statements which interfered with the contracts these parties had with Capital Management Group Inc. and Allentown Capital Management Group Inc., corporations in which Olick was a stockholder, officer and member of the Board of Directors.

15. During this same time period, Olick's clients, Robert and Anne Episcopo, were approached by DiMento and Nikles at the DiMento General Agency in Allentown.

16. Both DiMento and Nikles made slanderous statements concerning Olick and the aforementioned corporations, including that Olick was a liar and could not be trusted.

17. DiMento and Nikles had no basis for making such false and malicious statements concerning Olick.

18. Prior to Olick's termination, Nikles and DiMento never made such malicious statements concerning Olick, including, but not limited to, his trustworthiness and veracity.

19. Both Nikles and DiMento had knowledge of the aforementioned corporations prior to Olick's termination.

20. At no time prior to his termination did either Nikles and/or DiMento

express the opinion to Olick, or anyone else, that the aforementioned corporations were unregistered securities and/or that the aforementioned limited partnerships were considered "high risk."

21. Olick was required by the Defendants to discuss the use of limited partnerships as a part of financial planning and was required to memorize various sales presentations to be used in his interviews with his clients.

22. Olick was periodically tested by personnel of the Defendants on the manner in which he could repeat the aforementioned sales presentations.

23. Management personnel of the Defendants would periodically accompany Olick during his client interviews to critique his presentations.

24. Olick was required by the Defendants to complete a Suitability Statement concerning the purchase of limited partnerships and/or other securities by his clients.

25. Olick was also required to complete questionnaires, e.g. a "Financial Analysis", "Financial Planning Confidential", prior to making sales to his clients.

26. The Defendants' employees reviewed these aforementioned Suitability Statements prior to executing the purchases Olick submitted on behalf of his clients.

27. In general, the Defendants' employees did not question the suitability or purchases of Olick's clients, but on some occasions requested additional information prior to approving the investments purchased. Furthermore, the Defendants received no complaints from Olick's clients regarding security sales prior to his termination.

28. As part of the aforementioned "Questionnaires", Olick was required to attempt to review the Income Tax Returns, prior investments, savings, risk tolerance and other relevant information of his clients.

29. As part of his normal business practice, Olick had his clients complete the aforementioned questionnaire and produce the aforementioned documents.

30. In submitting investments to Distributors, Olick was required to disclose the aforementioned income, prior investments, net worth and personal information concerning his clients.

31. At all times relevant, Distributors had access to the aforementioned information, either directly through their own files, or by contacting Olick for copies of the same. Additionally, Olick learned that it was the practice in the Allentown General Agency to review and/or remove clients files from the Olick's office, without his knowledge.

32. When Olick learned of complaints

filed by his clients after his termination, Olick communicated by telephone and by letter to Distributors his willingness to respond to any and all complaints, to fully co-operate and produce any documents Distributors requested.

33. Distributors never requested documents, comments or other information concerning the aforementioned complaints, but instead attempted to keep the complaints secret from Olick.

34. After Olick's termination, Nikles prepared investment summaries for some of Olick's Hancock clients and obtained information concerning their net worth, income and/or investments with Hancock.

35. Nikles knew that the complaints filed with Distributors understated these investors' net worth and income as was noted in his own aforementioned records and summaries.

36. Beginning in April 1991, Olick's client mailed to him letters which summarized their meetings with Nikles and DiMento.

37. Upon receipt of the aforementioned client letters, Olick contacted Distributors and requested that Nikles and DiMento stop slandering Olick and interfering in his business.

36. Ken Ring Jr., a Senior Vice President of the Defendants, advised Olick that

Nikles would be contacted and that the aforementioned activities would cease.

39. Olick stopped receiving letters from his clients concerning the aforementioned activities of the Defendants and Olick believed that the slander and harassment had ceased.

40. At no time, with the exception of Elizabeth and Joseph Tellie in a subsequent NASD Arbitration the Tellies filed against Distributors, did Distributors make any requests from Olick regarding the net worth, suitability and/or income of the parities solicited by Distributors to complain about security purchases through Olick.

41. Except as noted above, Distributors never made any requests from Olick's clients, from whom Nikles solicited complaints, concerning their net worth, income, prior investments and/or suitability.

42. After meeting with Nikles in the summer of 1992, Laslo and JoAnn Zamolyi filed a complaint with Distributors sometime in 1992, in which they alleged misrepresentations by Olick in the sale of limited partnerships.

43. After meeting with Nikles, the Zamolyis met with Olick and demanded that he sign a document whereby he would agree to purchase their investments.

44. When Olick refused to comply, Laslo Zamolyi made threatening remarks to Olick to damage him in his property and reputation.

44. Prior to investing with Olick, Laslo and JoAnn Zamolyi had invested in tax shelters which were determined by the IRS to be abusive and for which they were required to pay back taxes, penalties and interest.

45. Distributors never made inquires to the Zamolyis regarding the aforementioned investments.

46. The Zamolyi's had received various gifts of money by Edwin Ahlum (JoAnn's father) as part of a tax plan, which had been reviewed by their accountant, to reduce Edwin's net worth in order to qualify for free nursing home care as an indigent person.

47. After they made their initial complaint, Distributors advised Nikles that the Zamolyi's had not included certain statements, including, but was not limited to, that the aforementioned Ahlum funds were part of the assets necessary to support Ahlum in retirement and/or a nursing home. Thereupon, after communicating with Nikles, the Zamolyi revised their complaint to include these new allegations.

48. Such statements were known to be untrue by all parties.

49. Such statements were made with malicious intent to cause damages to

Olick in his property and reputation.

50. The Defendants communicated the aforementioned untrue statements to third parties, including the NASD, with the intent that they would rely on the untruths.

51. These third parties justifiably relied upon the aforementioned lies.

52. Because of these third parties reliance upon the aforementioned lies, Olick suffered damages to his income, property and reputation.

53. After his termination, Distributors did not provide Olick with a NASD form U-5, i.e. a termination Notice.

54. Olick telephoned Distributors, requesting the above so that he might register with a new Broker Dealer.

55. Distributors informed Olick that they had not completed the form as they had not determined what to state as a reason for Olick's termination.

56. The DiMento General Agency previously informed Distributors that Olick had been terminated because of a "lack of production."

57. Olick was one of the leading agents in the DiMento Agency and a highly producing agent for the Hancock, sometimes being in the top twenty-five producers in the country.

58. Distributors eventually provided Olick with a U-5 which contained material misrepresentations as to why Olick was terminated, which included that Olick had refused, and/or was reluctant to submit to internal disciplinary measures.

59. Distributors knew that such statements were untrue.

60. Prior to completing the aforementioned U-5, Anne Buckley submitted various versions of the U-5 to DiMento for his review and/or comment.

61. It is not Distributor's normal practice for the General Agent to review and/or suggest changes to the U-5.

62. The Defendants knew that the aforementioned U-5 and other documents they had sent to the NASD would be added to Olick's CRD file and would be viewed by any prospective Broker Dealer whom Olick might wish to associate with.

63. Distributors made the aforementioned statements knowing that other parties would rely upon the U-5 as true.

64. Other Broker Dealers, with whom Olick had applied for employment, justifiably relied upon the aforementioned U-5 and other documents which the Defendants had caused to be added to Olick's NASD records.

65. Distributors also submitted to the NASD supplemental U-5's reporting the complaints solicited by the Defendants and which they knew contained misrepresentations.

66. Because of their reliance upon the aforementioned documents filed by Distributors with the NASD, Olick was denied employment with various Broker Dealers to which he had applied.

67. Because of the Broker Dealers reliance on the aforementioned documents, Olick was damaged in his property, income and reputation.

68. After Olick was provided with the first U-5 by Distributors, but before the supplemental U-5 concerning the aforementioned complaints were filed in 1992, Olick immediately registered with Northwestern National as his new Broker Dealer on or about June 1991.

69. Such registrations are a matter of public record and can be checked by a telephone call to the NASD.

70. At the request of Nikles, DiMento and the DiMento General Agency, Distributors' employees began to approach Olick's clients, under the guise of determining if Olick was selling securities at a time he was unregistered.

71. Distributors knew, or should have known, that Olick was now registered with another Broker Dealer.

72. During these interviews, Distributors made slanderous remarks concerning Olick, investments he had sold, and the veracity and trustworthiness of Olick.

73. The Distributors' employees had pre-printed complaint statements that they had requested Olick's clients to sign.

74. On or about December 1992, Kimberly Spense mailed to the NASD a letter regarding complaints solicited by Nikles from various clients of Olick. This correspondence was misleading, fraudulent and contained material misrepresentations, including but not limited to, statements which Ms. Spense knew, or should have known, to be in conflict with the documents in Hancock's and Distributor's files, including the suitability, sophistication, net worth and income of Olick's clients.

75. These statements were made with full knowledge that they were untrue, malicious and were material misrepresentations of facts known to the Defendants.

76. These correspondences prepared by Ms Spense were reviewed and approved by Anne Buckley prior to their being mailed to the NASD.

77. Ms Buckley knew that the aforementioned letter contained false, misleading and deceptive statements concerning Olick, his clients and investments they had

purchased from Olick.

78. Thereupon, the Defendants began a systematic campaign of contacting Olick's clients and made malicious, false and fraudulent statements against Olick regarding the sales of the aforementioned limited partnerships, variable life insurance and the nature of the aforementioned Corporations.

79. Distributors own files reveals that they did not believe that the aforementioned corporations were unregistered securities, and that they believed that the aforementioned limited partnerships were high risk when they were informing their agents that they were "safe" and "low risk".

80. The Defendants' files reveals that they had knowledge of the true net worth, assets and degree of sophistication of the parties who had filed complaints against Olick.

81. The Defendants failed to reveal the aforementioned information to the NASD regarding Olick, the complaints they forwarded to the NASD and the aforementioned corporations.

82. The NASD investigated the aforementioned corporations and found that they were not unregistered securities.

83. The NASD investigated the Complaints they had received from Distributors and found no improprieties.

84. The Defendants had been advised of the aforementioned findings of the NASD.

85. Despite being so advised, representatives of the Defendants' continue to make the same malicious and false statements concerning Olick and the corporations.

86. Olick advised Distributors and Hancock of the continued harassment by Nikles and DiMento, and further requested that these activities of their employees cease.

87. On or about September 1992, the Defendants caused the aforementioned complaints to be sent to Olick's new Broker Dealer, Northwestern National. The Defendants expected Northwestern National to rely upon the aforementioned documents, and it did justifiably rely upon these documents as true. Because of such reliance, Olick was damaged in his income, property and reputation.

88. In late 1991 and continuing through mid 1992, Olick had raised a litigation fund, retained counsel and was seeking damages from Parker & Parsley Inc, and Damson Oil Corp for damages he believed he and other similarly situated limited partners suffered in a limited partnership roll-up.

89. During the course of this litigation, various Distributors' clients contacted Olick and discussed their purchases of Damson Oil.

90. Some of these Distributor clients did not meet the stated suitability requirements in the prospectus for Damson.

91. Upon contacting Distributors, Olick was informed that Distributors was quietly re-purchasing Damson limited partnerships which were found to be purchased by unsuitable investors.

92. Olick was advised by Distributors to refer the aforementioned investors to Distributors.

93. Olick complied with the aforementioned Distributors request.

94. Thereupon, Distributors denied the aforementioned investor complaints.

95. In 1992, some of the aforementioned investors requested that Olick provide assistance to them and/or their counsel to seek refunds from Distributors.

96. In some cases, Olick consented to provide assistance in exchange for compensation for his services.

97. When Olick began to assist the aforementioned investors, the Defendants intensified their solicitations of complaints and began to interfere in his association with Northwestern National.

98. Between June and December 1992, the Defendants met with members of the Partnership Committees of Capital Management Group, a General

partnership of which Olick was a member, informed these parties that the Partnership was an unregistered security and encouraged them to file complaints concerning Olick.

99. The Defendants had no reasonable basis to make such statements.

100. In April of 1995, Greg Knaus informed Olick that Nikles advised him that Olick would never work in the financial services industry again, that the aforementioned corporations were unregistered securities and that the aforementioned variable life and limited partnerships were high risk and/or unsuitable for Mr Knaus.

101. Nikles suggested to Gregory Knaus that he file a complaint against Olick.

102. The Defendants failed to advise and/or direct their employees to stop the aforementioned malicious and vexing activities.

103. The aforementioned activities of the Defendants continues to this date.

104. The Complaints filed by Olick's clients refer to statements made by Nikles, other Hancock agents, and/or Distributors' personnel, which the Defendants knew were untrue and malicious.

105. Distributors sent a letter to Nikles cautioning him to be more careful that the complaints do not

refer to the statement Nikles made.

106. Distributors failed to advise Nikles to stop making slanderous statement against Olick and/or to stop soliciting complaints against Olick.

107. Olick had filed a complaint with the NASD wherein he alleged that various sales and marketing materials provided by John Hancock Variable Life Insurance Co. contained deceptive, fraudulent and material misrepresentations.

108. Olick had filed a Complaint through the NASD claiming the above sales and marketing materials for the limited partnerships were deceptive, fraudulent and contained material misrepresentations.

109. In NASD 92-04070, Olick won the aforementioned complaints against the above Defendants and was Awarded approximately $75,000.

110. Joseph & Elizabeth Tellie, clients of Olick, also filed complaints against Distributors alleging fraud, misrepresentation in the sales of limited partnerships and variable life insurance.

111. The Tellies received an award of $25,000 with interest in the aforementioned Arbitration, 92-04046.

112. As they had threatened, because of the activities and complaints solicited by the Defendants, Olick has been unable to find suitable

employment in the securities industry and his prior Broker Dealer terminated Olick after receiving copies of various complaints as noted above.

113. Various Broker Dealers informed Olick that he would not be hired specifically because of the aforementioned complaints in his NASD file.

114. Because of these malicious activities of the Defendants, Olick has suffered damage to his income, property and reputation.

115. Because of the above, Olick was forced to seek protection from his creditors in the Bankruptcy Court.

116. Various clients of Olick filed complaints against Olick based upon the allegations Nikles made to them concerning the aforementioned false and malicious statements concerning the corporations and the securities they had purchased from Olick using the sales materials provided by the Defendants.

117. Nikles also sold, or offered for sale, some or all, of the aforementioned insurance products and limited partnerships and used the same aforementioned Marketing Materials.

118. Anne Buckley and Larry Carter, current and former personnel in the John Hancock Distributor Inc.'s Compliance Department, testified in

both the NASD Arbitrations 92-04070 and 92-04046 that the Limited Partnerships sold by Olick were speculative, high risk, and/or suitable for only the most sophisticated investors.

119. Anne Buckley further testified, in her official capacity as the official representative of Distributors in the aforementioned Arbitrations, that the above statements represented Distributors' official opinion, both now, and at the time Olick sold the aforementioned Limited Partnerships to his clients and the Respondents. These statements are in direct conflict with the written Sales Tracks and marketing materials Profesco and Distributors supplied to Olick.

120. Such statements are in direct conflict with the aforementioned written Sales Tracks and Marketing Materials Distributors and Profesco supplied to Olick.

121. The aforementioned Marketing Materials and Sales Tracks were intentionally designed to mislead the agents to make representations concerning securities that the Defendants believed to be untrue.

122. The Defendants each profited from the sale of the aforementioned securities through commissions, Broker Dealer Allowances, and various charges they earned as a result of Olick's and other agents sales efforts.

123. John Hancock Realty Inc., a solely owned subsidiary of Hancock, marketed non-leveraged real estate limited partnerships up until sometime in 1991.

124. Distributors marketed the aforementioned limited partnership as "a unique investment offering safety of principal, high income ..."

125. After the sale, and after the partnerships declined 50% in value, the Defendants averred to Olick's clients that this real estate partnership was high risk.

126. Distributors made the aforementioned statements with malicious intent to cause damages to Olick in his property and reputation.

127. John Hancock Distributors has a written policy for handling customer complaints.

128. This policy includes requesting that the agent, who had sold the securities, were to be sent a copy of the Complaint and provided with an opportunity to respond to the Claim. This was Distributors normal and customary practice in the operation of its business.

129. In no case, did Distributors follow its own written internal policy with regards to claims against Olick. Distributors never requested a response from Olick to the Complaints of his clients and/or, in many cases, failed to inform him that a complaint

had been filed until after a "refund" was made and/or a decision was entered regarding the complaint.

130. Distributors normal and customary practice with claims against Olick was to require Olick's clients to sign a "Confidentiality Agreement" and to direct his clients not to discuss the Agreement and refund with Olick.

131. Mr Nikles had divulged the settlements and its terms to members of G&O (see below) and other co-conspirators with the knowledge and consent of the Defendants.

132. Kimberly Spense, an employee of Distributors in the Compliance Department, who reported to the aforementioned Anne Buckley, had made promises to Olick's clients to pay refunds for limited partnership purchases, even when Distributors had determined that such a refund was not warranted. Such payments were made with the full knowledge and consent of Distributors.

133. Kimberly Spense's employment has since been involuntarily terminated by Distributors.

134. Anne Buckley no longer works for Distributors.

135. A Class Action Complaint has been Settled by Distributors wherein fraud and material misrepresentations were claimed against Distributors regarding the sale of Damson Oil.

This Settlement involved a multi-million dollar payment to Hancock's customers.

136. Damson Oil is a limited partnership purchased by Jean, Edison and Wayne Dippel from Distributors, with Olick as the Registered Agent.

137. After meeting with Mr Nikles, the Dippels filed complaints to Distributors, i.e. against Olick, regarding the aforementioned purchases of Damson Oil.

138. Edison and Jean Dippel made material misrepresentations to Distributors regarding their income, sophistication, net worth and failed to disclose to Distributors that their investments were made after being reviewed by their accountant.

139. Distributors had refunded the purchase payments of Damson Oil to the Dippels and filed a Complaint against Olick to recover the aforementioned refund. Distributors also paid the Dippels interest on the aforementioned investments at an interest rate higher than that prescribed in Pennsylvania.

140. Pursuant to an agreement between Edison Dippel, Larry Carter and Distributors, the repurchase of the limited partnerships and Unit Investment Trusts by Distributors were never reported to the IRS, which is a violation of the Tax Codes. Edison Dippel fraudulently has failed to file tax returns since 1986.

141. Distributor's claims against Olick, i.e. for reimbursement of the payments to the Dippels, were Denied in the aforementioned NASD Arbitration.

142. After meeting with Nikles, Ernest and Virginia Andrews filed a Complaint with Distributors against Olick. This complaint understated their income, net worth, degree of sophistication and failed to inform Distributors that their investments were made after review with their accountants.

143. Distributors purchased the Andrews investments and failed to report the sales to the IRS. At the request of the Andrews, Distributors thereupon paid to the Andrews additional payments of interest at a higher rate than prescribed by code in Pennsylvania.

144. Distributors made indemnification charges against Olick for the payments made to the Andrews, Dippels and Tellies in the aforementioned NASD Arbitration.

145. Distributors never informed Olick that the Andrews and Dippels had filed a Complaint and never requested a statement from Olick regarding the aforementioned Complaint.

146. Distributors had no right to seek indemnity from Olick for the aforementioned payments in either Common Law and/or by Contract.

147. Counsel for Olick informed Frederick Keuthen, counsel for Distributors, that Distributors had no basis to seek indemnification from Olick.

148. Despite being informed of the lack of a basis to litigate against Olick, Distributors proceeding to litigate against Olick. Such litigation caused Olick to expend $30,000 in legal fees and costs.

149. The NASD Arbitrators denied the Claims of Distributors.

150. The Pennsylvania Security Commission, the NASD and the United States Security and Exchange Commission are currently investigating the sales practices of Distributors regarding the aforementioned limited partnerships.

151. As noted in the Statement of Claim, after visiting with Respondent Nikles, various other clients of Olick filed similar complaints with Distributors.

152. Several of these clients haves stated to Olick that the context of their claims were provided by Nikles and that they really did not understand their complaints.

153. The aforementioned complaints contain reference to statements made by Nikles, i.e. regarding Olick and the sales Olick made, which Nikles knew, or should have known, were false and/or were contrary to the Sales Tracks and Marketing literature

published by Distributors at the time of the sales. Distributors was in direct contact with Nikles concerning these claims and was providing advice concerning how the complaints should be revised to include claims not previously stated. Olick's clients & the members of G&O followed Distributors and Nikles advice and revised the complaints as suggested.

154. Amongst other representations the Defendants made to Olick's clients and members of G&O, was that Capital Management Group was an unregistered security, that Capital Management Group Inc. and/or Olick were receiving illegal commissions, that Olick was "selling away" from his Broker/Dealer, and that Olick had distributed unapproved marketing materials to his clients and/or had conducted illegal sales practices, such as highlighting prospectuses.

155. Nikles knew, or should have known, that each of the aforementioned statements were false and deceptive.

156. Prior to his termination by Distributors, Olick had supplied to Distributors a list, including addresses, of members of Capital Management Group, a Pennsylvania General Partnership, which list included officers and management personnel.

157. Nikles, at all times under the control, direction and supervision of the Defendants, began to approach Olick's clients within one week of

his termination by Joseph DiMento, but prior to his termination by Distributors.

158. Nikles made statements to Olick's clients and/or members of Capital Management Group and G&O as noted above, which Nikles had insufficient basis to make, were false, and/or Nikles should have known were untrue, were designed to deceive, to be relied upon, and were justifiably relied upon by the aforementioned parties. These statements were made with malice and intent to cause direct and proximate damage to Olick, his business his income and reputation in the community. Nikles knew and intended for these statements to be repeated and disseminated to the public and other clients of Olick.

159. Nikles approached the members of the aforementioned partnership, i.e. who had been previously disclosed by Olick to Distributors, including the officers and management personnel of the partnership, and suggested to them to file complaints against Olick with Distributors. As an inducement, Nikles disclosed prior "Confidential" settlements by Distributors with other clients of Olick.

160. By these acts, the Defendants intentionally and maliciously interfered with the management and business of Olick, the aforementioned partnerships & corporations, and a second Pennsylvania General Partnership called Allentown Capital

Management Group.

161. Olick is and/or was an officer, general partner and trustee of the two aforementioned Pennsylvania Partnerships.

162. Olick is a stockholder, Director and officer of two Corporations (Capital Management Group Inc. and Allentown Capital Management Group Inc.), which has contracted with the aforementioned partnerships to provide valuable services and to act as a fiduciary to the aforementioned partnerships. Nikles actions interfered with the performance of these contracts between the partnerships and corporations. Nikles actions directly and proximately caused the refusal of the partners to reimburse Olick and the Corporations for the costs and expenses they had incurred on behalf of the partnerships and pursuant to the contract between them.

163. Because of the Defendants' actions, Olick, the aforementioned partnerships and corporations have lost $2,700,000 in assets and income, lost $224,000 in attorney fees, $185,000 in Judgments and $100,000 in assets which had to be liquidated at "fire sales" to defend against the claims which resulted from representations made by Nikles to members of the aforementioned partnerships and/or were lost pursuant to judgments and sheriff sales by creditors of the Corporations.

164. Additionally, Olick was forced to liquidate various personal assets, which he had purchased for $170,000, at "fire sale" prices, to provide support to his family as a direct result from the Defendants' slander, defamations, and Tortous Interference in the Business and Contracts Olick had with various insurance companies, his employment, the aforementioned partnerships and Corporations.

165. As a proximate, direct and/or indirect result of the aforementioned actions of the aforementioned co-conspirators and the Defendants, Olick had to resort to filing for Chapter 13 Bankruptcy to provide relief from his Creditors.

166. As a proximate and direct result of the aforementioned actions, Olick has spent $10,000, including attorney fees, in the aforementioned Bankruptcy proceedings.

167. As a result of the aforementioned representations of the Defendants regarding the nature of Capital Management Group and the corporations, various members of the aforementioned partnerships have filed unsecured claims of $270,000 against Olick in the aforementioned Bankruptcy. Distributors and John Hancock Mutual Life Insurance Company had filed secured claims of $3,000 and requested the Stay be lifted to pursue Olick for the aforementioned indemnification through the NASD. The Stay was lifted.

168. The unsecured claims that are a result of the Defendants and the aforementioned co-conspirators have caused damages to Olick of $270,000.

169. Because the Defendants had systematical approached and made untrue representations to the management and officers of the aforementioned Partnerships, these persons have ceased their functions as officers and management of the entities, which resulted in a complete loss of assets to the partnerships, purchased at a cost in excess of $900,000, which includes oil & gas wells, well operating equipment, and natural gas future delivery contracts.

170. Distributors, Joseph DiMento, the DiMento General Agency, and John Hancock Mutual Life Insurance Company encouraged, assisted both in personnel and with finances, by preparing and disseminating false and malicious reports which were designed to disparage and damage Olick, the aforementioned Partnerships and Corporations, to cause the aforementioned damages.

171. The Defendants knew, or should have known, that the documents they disseminated and statements they had made, were misleading, deceptive and false, and the distribution of which would cause serious and irreparable harm to the Plaintiff in his income, property and reputation.

172. The aforementioned documents

included, but were not limited to, Investigator Reports and correspondence with the NASD in Philadelphia.

173. In addition to the above, the Defendants, through their own acts and that of their agents, approached various clients of Olick who had purchased mutual funds, insurance, annuities and other products from Olick. During these meeting, the Defendants made false statements, misrepresentations, and other untruths regarding Olick, the companies Olick represented and the products they had purchased. Such statements were designed to replace, disparage and damage Olick and the aforementioned business contracts and relationships.

174. At all times relevant, the actions of the Defendants and their agents, including but not limited to, their statements concerning the aforementioned partnerships, corporations, the limited partnerships, and Olick's character, was known, approved and encouraged by the other Defendants and was done at their direction.

175. The aforementioned conspirators began to approach Olick's clients and/or the members of the partnerships in April of 1991.

176. In June 1991, after having been contacted by Nikles, these aforementioned partners formed a new entity which they named G&O.

177. Immediately thereafter, G&O began holding secret and confidential meetings wherein they began to interfere in the formal operation of the aforementioned partnerships and Olick's business and contracts, which included in taking over the management of the partnerships, creating unauthorized bank accounts for the aforementioned corporations, writing fraudulent letters to the Debtors of the Corporations to misdirect corporate income to the aforementioned unauthorized bank accounts, diverting these by withdrawing funds by checks made payable to the conspirators, using the U.S. Mail to solicit funds, loans and other monies to be deposited in the aforementioned unauthorized bank accounts, fraudulently representing themselves through the U.S. Mail, as being officers, employees and Directors of the aforementioned corporations, and otherwise conducting acts best described as Racketeering and Corrupt, including but not limited as making terroristic threats to the Claimant and his wife.

178. At all times relevant, these conspirators were in direct and repeated contact with each other, and the aforementioned Defendants.

179. The aforementioned bank accounts, checks, correspondences and records, which had been previously unknown to Olick, were produced by Distributors during depositions of the aforementioned co-conspirators in the litigation entitled Carroll v. John

Hancock Distributors Inc. (92-cv-5907), of which Olick was a Defendant. Counsel for Nikles has identified the aforementioned Documents in their list for this NASD Arbitration (i.e. the aforementioned documents obtained in deposition and discovery). Because of this, specific dates and notations will not be made at this time as the documents will speak for themselves.

180. During all of the aforementioned times, and as will be noted in the aforementioned documents, these G&O conspirators were in direct and repeated contact with each other, Nikles, Distributors and the aforementioned co-conspirators.

181. Distributors and Nikles provided the members of G&O with encouragement, advise, and the promise of payments to participate in the aforementioned activities and to file complaints against Olick.

182. Distributors did make payments to some of the aforementioned conspirators, including, but not limited to, Edison & Jean Dippel, Virginia and Ernest Andrews, Laslo and JoAnne Zamolyi, which co-conspirators thereupon re-invested with Nikles and Distributors providing profit and income to these parties and to perpetuate the enterprise.

183. Distributors provided these payments under the guise of interstate purchases and sales of securities,

for which they have attempted to recover from Olick by filing false and malicious claims through the NASD and the U.S. Bankruptcy Court for the Eastern District of Penn.

184. Distributors, the DiMento General Agency, Joseph DiMento and the other co-conspirators have entered into a "Confidential Settlement" with the aforementioned members of G&O and certain other parties, which have been kept secret from Olick.

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185. Distributors has threatened Olick, during the formal Hearings with Judge Gawthrop in the aforementioned litigation, that they intend to collect from Olick the previously mentioned Confidential Settlement paid to the founding members of G&O and other co-conspirators.

186. The Allentown General Agency, the DiMento General Agency, John Hancock Mutual Life Insurance Company, Distributors, G&O, Wayne's Family Restaurant, Profesco, John Hancock Variable Life Insurance Company, and Quantum Financial Insurance Associates Inc. and Quantum Financial Group Inc. each constitute an "enterprise" as defined in 18 U.S.C. 1961 (4).

187. Distributors knew, or should have known, that the aforementioned complaints which were being filed by Olick's clients and members of G&O, i.e. after their meetings with Nikles, were untrue, misleading and deceptive, and were contrary to the

prior letters and correspondence Distributors had received from the same individuals prior to their meetings with Nikles.

188. Nikles and Distributors filed these complaints against Olick with the NASD and failed to disclose to the NASD that their own internal investigation resulted in the denials of the claims.

189. Nikles, as noted in the Statement of Claim, told Olick's clients that Olick would never be allowed to work in the financial services industry again, when he had no basis for making such a statement.

190. By soliciting complaints against Olick, the Defendants have made it impossible for Olick to obtain employment by a Broker/Dealer and/or to continue employment in the securities industry.

191. These aforementioned acts were wilful, malicious and with full intent to damage and harm Olick.

192. For the five years prior to his termination, Olick's average earnings from the sale of securities and related products was $60,574.

193. Since that time, Olick has received no income from the sale of securities and related products.

194. Between his termination and the present, Olick's has lost $302,873 in the aforementioned sales.

195. Between 1995 and retirement at age 65, without adjustment for normal increases due to inflation, renewals and trail commissions, Olick will have lost future earnings of $1,150,906.

196. Olick should be entitled to damages which include the aforementioned losses, plus normal increases due to renewals, trail commissions and inflation for the period of his termination until his retirement in 19 years at age 65. Such increases should be at least 10% per year based on Olick's prior five year average earnings.

197. Agents are vested in renewals after a period of service. These renewals, called service fees, continue until the agents death, and then usually until the death of the agent's spouse.

198. Olick is entitled to damages for post retirement income from age 65 until the normal joint life expectancy of Olick and his wife at a rate not less than 50% of his income calculated as noted above at age 65.

199. Punitive damages, exemplary damages, pre-judgment and post-judgment interest should be awarded to the Claimant at the highest rates allowed by the State of Pennsylvania on any Award or Damages awarded to Olick.

200. Costs of the suit and counsel fees, if he employs one, should be awarded

to Olick.

201. Olick has been damaged by the aforementioned acts in his property, business and reputation in amounts noted as follows:

a) Tortous interference in business and contracts:	$5,023,779
b) Loss of income	
1991 through 1995	$302,873
1995 until age 65	1,150,906
age 65 until death (death at age 85)	600,000
	$2,053,779
c) Prior legal fees	$224,000
d) Damage to Property	$270,000
e) Conversion, theft by deception	$ 71,000
f) Bankruptcy Claims and costs	$280,000
g) Defamation, slander, libel	$1,453,779
h) malicious prosecution	$30,000
i) RICO	$9,406,337
j) Fraud & material misrepresentations	$9,406,337

k) indemnification for any claims made against Olick as a result of the fraudulent, deceptive and negligent misrepresentations the Defendants caused Olick to make through their aforementioned sales and marketing materials.

Therefore, Olick prays that the Arbitration Panel Grant his Claims and find against the Respondents, jointly and severally, in the amounts noted above, together with the adjustments for punitive damages, exemplary damages, pre-judgment and post judgment interest, and the other damages as outlined in the text of this complaint and that are deemed appropriate by the Panel.

Respectfully Submitted;
/s/
Thomas W Olick
4014 Crestview Ave
Easton, Pa 18045
610-253-8040

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

John J Carroll Jr. v John Hancock Distributors et. al.	CIVIL ACTION No 92-cv-5907

Defendant Thomas W Olick, hereinafter referred to as Olick, file this Request for Permission by the court to add as Additional Defendants and to file Third Party Claims against Thomas Nikles, Virginia Andrews, Richard "Scott" Lane, JoAnn Lane, John Gallery, Mary Jane Gallery, Jack Schmidt, John Daviduke, Daniel Stevens, George Rostas, George Smith, Laslo Zamolyi, JoAnn Zamolyi, Glen & Helen Miller, Michael Dowd, Kimberly Spense, Ann Buckley, George Mosselli and Bessie Mosselli, hereinafter referred to as Additional Defendants, and to file Cross Claims against Defendants Joseph DiMento and John Hancock Distributors Inc

Defendants Olick hereby requests that the Court allow Defendant Olick to file Cross Claims against Defendant Joseph DiMento and John Hancock Distributors Inc., to add Additional Defendants and to file Third Party Claims (or Cross Claims) against the Additional Defendants, for the following reasons:

1) The litigation at hand is partially the result of solicitations of Defendant DiMento and/or through his employee Thomas Nikles.

2) The information concerning the involvement of DiMento and Nikles was suspected and Olick now believes that he has documented proof of the sake.

There is now an overwhelming abundance of documents and evidence that the above solicited the Plaintiffs and other parties to file complaints with John Hancock Distributors Inc., requesting refunds regarding the partnership Capital Management Group and Allentown Capital Management Group, as well as certain other investments (e.g. Unit Investment Trusts) and limited partnerships. Olick will show that these solicitations were part of a vendetta, a RICO enterprise on the part of Nikles, DiMento and certain other parties, as well as part of a scheme to generate commissions and other profits by the same.

Furthermore, it will be shown that John Hancock Distributors Inc. and/or certain Home Office employees of the same, with the knowledge and consent of Distributors, were willing conspirators in this scheme. Olick will show that this enterprise meets all of the requirements of the RICO statutes and is continuing in damage and activity to the detriment of Olick and other parties.

3) Defendant Olick has filed claims against Virginia Andrews through the NASD Arbitration Rules. Olick believes that he is required to do so under previously signed Arbitration Agreements with the NASD and an Arbitration Claims filed Nov. 1992.

4) On 12/14/93, counsel for Virginia Andrews notified that his client would not submit to Arbitration and Olick was informed that his Arbitration Agreement does not bind Andrews to

Arbitration. Olick was notified of the above on 1/11/94 and received a copy of the Andrews' counsel refusal to submit to Arbitration on 1/22/94.

5) On 1/18/94, Olick inquired to representatives of Riley's office, counsel for the Additional Defendants, would submit to NASD Arbitration regarding Olick's claims against the same. Riley's representative averred that they would not submit to NASD Arbitration.

6) The scope and rational for previously mentioned scheme of Nikles and the other Third Party Defendants' and the reasons for Distributors' involvement was not fully apparent to Olick until his discovery trip to Boston on 12/1/93 in what is believed to be a separate, but is now determined to be a related matter, and certain other documents which have come into the possession of Olick within the last few days.

Prior to this time, making these allegations and filling the stated Cross and Third Party Claims would have violated Rule 11 of Civ. Proc. by Olick.

7) The parties listed as Additional Defendants owed fiduciary duties to the Plaintiffs and Olick. These Additional Defendants, in violation of this fiduciary duty, entered into a scheme with Defendants Nikles, DiMento and Distributors to engage in RICO activities. In the process of this RICO activities, damages were incurred by Olick, the Plaintiffs and others which caused, or increased, the

damages claimed by the Plaintiffs.

8) In as much as these Additional Defendants caused or increased the damages to the Plaintiffs, Olick and related parties as alleged in part by the Plaintiffs' Second Amended Complaint, it is proper that claims against these Additional Defendants be litigated in this matter pending before the Court.

Therefore, Defendant Thomas w Olick requests the Court to allow him to add the above Additional Defendants and to file Third Party and Cross Claims as outlined above against Defendants DiMento, Distributors and the Additional Defendants.

Respectfully Submitted;
/s/
T W Olick

Certificate of Service

And Now, this 2nd day of February 1994, I hereby certify that a true and correct copy of the foregoing Defendant Olick's Requests to add Additional Defendants and to file Cross and Third Party Claims were served upon the following individuals at their respective addresses by depositing the same in the United States Mail, first class, postage prepaid, at Palmer, Pa.

James J Riley, esq
221 Mohantongo St.
Pottsville, Pa 17901

John Shustead
200 S Broad St.
Suite 300
Philadelphia, Pa
19102

Michael Murphy, C. Cohen
2400 N St NW, 5th
Washington, D.C.
20037

Joseph Corby
P.O. Box 172
St. Clair, Pa 17970

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

John J Carroll Jr.	CIVIL ACTION
v	No 92-cv-5907
John Hancock Distributors et. al.	

OPPOSITION OF JOHN HANCOCK DISTRIBUTORS INC., AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY TO DEFENDANT OLICK'S MOTION TO ADDITIONAL DEFENDANTS AND TO FILE THIRD PARTY CLAIMS

Defendants, John Hancock Distributors Inc. and John Hancock Mutual Life Insurance Company (hereafter collectively referred to as "John Hancock"), hereby file this opposition to Defendant Thomas W Olick's Motion for Permission to Add Additional Defendants and to File Third Party Claims. In his motion, Olick seeks to add at least 20 additional parties and to file cross claims against defendants Joseph DiMento and John Hancock based on contentions that DiMento and his sales manager, Thomas Nikles, solicited a number of individuals to file complaints against Olick with John Hancock Distributors and induced the three plaintiffs to bring this very lawsuit. See Defendant Olick's Motion for Permission to Add Additional Defendants and to File Third Party Claims, February 10, 1994. *1. Olick's Motion was filed on February 10, 1994 and was reinstated by this Court by Order entered June 4, 1994.

*1. Although Olick's motion generally describes the additional claims he

John Hancock and defendant Joseph DiMento opposed Olick's motion at the time it was filed because Olick had not timely included third party or cross claims in his answer to Plaintiff's Second Amended Complaint and because Olick's proposed claims are duplicative of claims he already is asserting in pending litigation before Honorable Judge Edward N. Cahn in the case styled Olick v Nikles, et. al., Civil Action No. 93-cv-1495. Judge Cahn has dismissed several of Olick's claims raised in the Nikles litigation and has referred the other claims to NASD arbitration. Accordingly, there is no basis to relitigate claims that already have been decided or are being addressed in ongoing litigation or arbitration. See Defendant Joseph DiMento's opposition to Olick's "Request for Permission" to file Third Party Claims and Cross-Claims. February 10, 1994; Defendant John Hancock Distributors Inc. and John Hancock Mutual Life Insurance Company's Opposition to Defendant Olick's "Request for Permission" to file Third Party Claims and Cross-Claims, February 18, 1994. These reasons to deny Olick's Motion still hold true today.

In addition, this Court's rules specify that an application to join

(*1 continued) desires to assert, the motion is not accompanied by the proposed complaint. The failure to include a proposed complaint may be sufficient basis to deny Olick's motion. See Ivey v Daus 17 F.R.D. 319, 323 (S.D.N.Y. 1955) (court denied defendant's motion to serve third-party complaint where copies of complaint not provided).

additional parties "will ordinarily be denied as untimely" unless filed not more than 90 days after service of the moving party's answer. Local Rule 22. In this case Olick asserts that he served his answer to Plaintiffs' Second Amended Complaint on June 17, 1993. Since Olick didn't file his motion to add additional defendants until February, 1994, his motion is time barred under this court's rules. See Lovallo v Pittsburg Corning Corp., 99 F.R.D. 627 (E.D. Pa 1983) (defendant's motion for leave to file third party claims denied where 90 day limit under local rule had passed); Goodman v Neff 251 F Supp 562, 564 (E.D. Pa 1996) (in absence of showing why local rule should not be followed, untimely motion for leave to join third-party defendants denied) (decided under predecessor to Local Rule 22).

Adhering to this Court's time limits especially is warranted here since granting Olick's request would result in unnecessary delay for the resolution of this lawsuit. By order of this Court, discovery in this case closed on June 3, 1994. *2 The parties have until June 24 to file any dispositive motions and it is anticipated that this case will be placed in the trial pool after any such motions are ruled upon. To allow Olick to file new claims against additional defendants at this late stage of the proceedings, indisputably would require a complete revision in this schedule and a reopening

*2. At the time this Court extended discovery through June 4, 1994, the court indicated that no further extensions would be granted. See Order, February 17, 1994.

of discovery. See Delco Wire & Cable Co. v Keystone Roofing Co. 80 F.R.D. 428, 430 (E.D. Pa 1978) (motion to add third party defendant denied where granting the motion would add many months to protracted litigation); Union Nat'l Bank v Superior Steel Corp. 9 F.R.D. 128, 130-31 (W.D. Pa 1949) (timeliness is a "cogent factor" on determining whether to grant motion to add third party defendant); Braun v Hecht Co. 21 F.R.D. 391, 393 (S.D.N.Y. 1957) (motions for leave to implead a third party should be made promptly or "as soon as possible after filing of the pleadings in the suit").

Moreover, were Olick allowed to file third party and cross-claims at this late stage, these filings, in essence would spawn a totally new and distinct cause of action based upon Olick's fantastic charges that DiMento, Nickles, John Hancock and others conspired to induce the filing of various claims against him, including this lawsuit. Olick's allegations of malicious prosecution clearly are not sufficiently related to the instant cause of action to be treated as a legally cognizable third-party or cross-claim. *3 See Danner v Anskis 256 F 2d 123, 124 (3d Cir 1958) ("cross claim is intended to state a claim which is ancillary to a claim stated in a complaint ... which has previously been filed against the party stating the cross-

*3. Olick fails to state a claim for abuse of process because there has been no "arrest or seizure of his property designed". Lessard v Jersey Shore State Bank 702 F Supp 96, 99 (M.D. Pa. 1988).

through the use of legal process for the purpose other than that which it is claim"); United States v DCS Development Corp. 590 F Supp 1117 (W.D.N.Y. 1990) (where claim not properly considered as third party or cross claim and should be dismissed); Food Service Inc. v Trade Street Research Inc. 129 F.R.D. 126, 130 (W.D.N.Y. 1990) (proposed slander cross-claim against co-defendants was too removed from allegations of original action to be permitted).

Further, any conceivable third party or cross claim that Olick may have for malicious persecution must await the outcome of this case in which the plaintiffs have charged Olick with committing common law fraud and securities violations. 42 Pa Cons. Stat. Ann. @ 8351(a); Lessard v Jersey Shore State Bank 702 F Supp 96, 98 (M.D. Pa. 1988) (plaintiff must establish termination of the underlying action in his favor); United States ex rel. Sacks v Philadelphia Health management Corp. 919 F Supp 818, 826 (E.D. Pa. 1981) (dismissing defendant's counterclaims for malicious prosecution as not ripe). See also Ivev v Daus 17 F.R.D. 319, 323 (S.D.N.Y. 1995) (counterclaim for malicious prosecution dismissed where action alleged to been maliciously prosecuted not terminated). If a judgment is rendered against Olick in this lawsuit, then any claim for malicious prosecution obviously may not lie.

In short, the claims Olick seeks to foist into this lawsuit are totally unrelated to the issues raised by the plaintiffs' cause of action and, to the extent the claims have any merit, which is denied, they clearly are premature.

There is absolutely no reason why the trial of this lawsuit should be unduly complicated and delayed so as to afford Olick the opportunity to waste the time not only of the other parties, but of this court in pursuing his chimerical claims. U.S. Fidelity & Guaranty Co. v Perkins 388 F 2d 771, 773 (10th Cir 1968) (motion to file third party complaint denied where it is would involve trial of issues not involved in controversy between original parties and would not serve any convenience); United States v DeHaven 13 F/R/D/ 435 (D. Mich. 1953) (filing of third party action denied where different issues of fact and law involved). *4

Therefore, John Hancock respectfully submits that in the interests of judicial economy and fairness to all of the parties, this Court should deny Olick's Motion for Permission to Add Additional Defendants and to File Third Party Claims.

Respectfully Submitted;
/s/
Edward C Mengel Jr
White & Williams
One Liberty Place
Suite 1800, 1650 Market Place
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19103
(215) 864-7000

Jonathan R. Mook
Michael J. Murphy
Ogletree, Deakins, Nash Smoak
& Stewart
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(202) 887-0885

Dated: June 17, 1994

*4. Even if Olick's claims against the 20 individual defendants he has identified could be asserted as third-party claims, Olick's motion to add these additional parties still should be denied because there is no basis for this Court to exercise ancillary jurisdiction over these individuals. Olick has not claimed any basis for jurisdiction based upon either a federal question or diversity. Accordingly, Olick's motion should be denied on this alternative ground. U.S. Fire Ins. Co. v Reading Mun. Airport Auth. 130 F.R.D. 38, 40 (E.D.Pa 1990).

UNIFORM APPLICATION FOR SECURITIES
INDUSTRY REGISTRATION

Applicant's Name: Olick, Thomas W.
Employment Date: 6/21/83
Firm Number: 000468
Firm Name: John Hancock Distributors Inc.
Firm Address: P.O. Box 21, John Hancock Place, Boston Massachusetts, 02117
State: Pa.
Will Applicant Maintain registration with another Broker/Dealer? Yes.
Firm Number: 005181
Firm Name: John Hancock Mutual Life Insurance Co.
Type of approval requested: Investment company and variable contracts products representative.
Signature of Applicant: /s/ Thomas W Olick 6/21/83

Page 1

The following should be read very carefully by the applicant.

1. I hereby certify I have read and understand the foregoing statements and that my responses are true and complete to the best of my knowledge.

2. I hereby apply for registration with the organizations and states indicated in question 8 and, in consideration of such organizations and states receiving and considering my application, I submit myself to the jurisdiction of such states and organizations and hereby certify that I have read, understand and agree to abide by, comply with, and adhere to all the provisions, conditions and

covenants of the statutes, constitutions, certificates of incorporation, by-laws, and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time, and I agree to comply with, be subject to and abide by all such requirements and all rulings, orders, directives and decisions of and penalties, prohibitions and limitations imposed by such states and organizations as to the result and examination(s) that I may be required to pass will be accepted by me as final.

3. I further agree that neither the states or organizations nor their officers, employees and others acting on tier behalf shall be liable to me for actions taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of such states and organizations.

4. I authorize the states and organizations to make available to any employer or prospective employer, or to any federal, state or municipal agency, or any securities or commodities industry self-regulatory organization any information they have concerning me and I release the states and organizations, their employees and agents, from any and all liability of whatever nature by reason of furnishing such information.

5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or by-laws of the organization with which I register as indicated in Question 8.

6. The undersigned for the purpose of complying with the laws of the State(s) I have designated in Item 8 relating to either the registration or sale of securities or commodities, hereby irrevocably appoint the administrator of each of those State(s), or such other person designated by law and the successors in such office, my attorney in said State(s) upon who may be served any notice, process of pleading in any action or proceeding arising out or in connection with the offer or sale of securities or commodities, or out of violations or alleged violation of the aforesaid laws of said State(s) and I do hereby consent that any such action or proceedings against me may be commenced in any court of competent jurisdiction and proper venue with process in said State(s) by service of process upon said appointee with the same effect as if I was a resident in said State and had lawfully been served with process in said State(s). It is requested that a copy of any notice, process or pleading served hereunder be mailed to me at my residence.

NOTARIZATION OF APPLICANT'S SIGNATURE
"NOTARIZATION REQUIRED"

6/21/83 name of witness: /s/
Joseph DiMento

6/21/83 name of applicant /s/
Thomas W Olick

(authorized employee)

State of Pa, County Lehigh

Subscribed and sworn before me this 21 day of June 1983 by /s/ Catherine Weiner, notary public my commission expires September 11, 1984, Salisbury Township Lehigh County, Pa. ...

.....

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re:	
Thomas W Olick and Kathryn A Olick Debtors	Chapter 13 Case No. 93-23114

AND NOW, in consideration of the Motion of John Hancock Distributors Inc. for relief from the Stay (the "Motion"), and after due notice and hearing and for good cause shown, it is hereby:

ORDERED that John Hancock Distributors Inc is hereby granted relief from the automatic stay under 11 U.S.C. @ 362 for the purpose of prosecuting the counterclaim asserted against Thomas Olick in an arbitration proceeding entitled Thomas Olick, Kathryn Olick and Irene Olick v John Hancock Distributors Inc, NASD Case No. 92-04070, and to prosecute, as an additional counterclaim in the same proceeding, the third party claim asserted by it against Thomas Olick in an arbitration proceeding entitled Elizabeth and Joseph Tellie v John Hancock Distributors Inc., NASD Case No. 92-04046.

Dated Reading, Pa 4-19, 1994

/s/
Stephen Raslavich
United States Bankruptcy Judge

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No 00-1763

JOHN HANCOCK DISTRIBUTORS INC.
JOHN HANCOCK MUTUAL LIFE INS. COMPANY
LARRY CARTER
v
THOMAS W OLICK
APPELLANT

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-cv-04460)
District Judge: Hon. James T. Giles

Submitted Under Third Circuit LAR 34.1(a)
August 22, 2001

Before: SLOVITZ, ROTH AND COWEN
Circuit Judges

(Filed: August 28, 2001)

OPINION

PER CURIAM

In December 1998 the District Court entered summary judgment in favor of Hancock finding that the claims asserted by Olick in a 1996 Statement of Claims filed with the NASD were barred as res judicata *1 We affirmed. John Hancock v Olick C.A. Nos. 98-2178 and 99-1123.

Olick filed a Rule 60(b) motion which we denied. Olick's appeal from that decision is pending. In August 1999 Olick filed another Statement of Claim with the NASD. The District Court entered a permanent injunction against Olick's prosecution of that case. Olick's appeal from that decision is also pending.

Undeterred, shortly after the District Court entered its permanent injunction, in April 2000 Olick filed yet another Statement of Claim in which Olick presents one claim, for malicious prosecution based on a counterclaim which Hancock filed against him in a 1992 NASD arbitration. Believing that Olick admitted in his 2000 Statement of Claim that he presented the same claim in his 1996 Statement of Claim, Hancock filed a motion to enforce the District Court's final judgment and/or for a finding of civil contempt. The District Court agreed that its final judgment bars Olick from asserting the claim presented in that action, ordered Olick to "cease and desist from filing further actions in the NASD or elsewhere based on the same facts alleged to have supported the claims and relief he sought in the 1996 Statement of Claim," and ordered Olick to pay Hancock's reasonable costs in bringing the motion. This timely appeal followed.

I

Olick argues that the 2000 arbitration claim is not barred because, under Pennsylvania law, he could not have

*1. The parties are familiar with the extensive procedural background of the instant appeal, and we have described it in previous opinions. Accordingly, we do not repeat it here.

brought a malicious prosecution claim until after September 28, 1995, when the appellees' indemnity claims were denied by the arbitration panel in NASD 92-04070. He contention appears to be correct. As the Pennsylvania Superior Court has stated:

> (T)he Legislature has delineated five facts that a plaintiff must show to succeed (in a "wrongful use of civil proceedings' action): (1) the defendant has procured, initiated or continued the civil proceedings against him; (2) the proceedings were terminated in his favor; (3) the defendant did not have probable cause for his action; (4) the primary purpose for which the proceedings were brought was not that of securing the proper discovery, joinder of parties or adjudication of the claim on which the proceedings were based; and (5) the plaintiff has suffered damages ..."

Kit v Mitchell 771 A 2d 814, 819 (Pa Super. 2001).

Moreover, in John Hancock Distributors Inc. v Olick, C.A. Nos. 98-2178 and 99-1123 we found that, despite Olick's assertions to the contrary (in a different attempt to avoid res judicata), he did not include a claim for malicious prosecution in his 1996 Statement of Claim. Besides, his 1996 Statement of Claim was subsequently enjoined, so that could not bring the claim before the NASD in an amended Statement. *2

*2. we note that the appellees state that Olick "has boldly admitted in the 200 Statement of Claim (that) he pled the same facts, trying to support the

Accordingly, because it appears that Olick could not have brought the instant malicious prosecution claim in previous litigation, and because he did not do so in the 1996 Statement of Claim, we find that the District Court erred in granting the appellees' motion for the reasons it gives. Accordingly, we shall vacate the District Court's order and remand for further proceedings consistent with this opinion. we express no opinion concerning whether there are other reasons to enjoin Olick's pursuit of his 2000 claim or whether the claim has merit.

(*2 continued) identical claim for malicious prosecution in the 1996 arbitration that he is now asserting in the 200 Statement of Claim." They cite in support @12 of the Statement. However, @12 merely notes that Olick "filed for NASD Arbitration ... to recover damages, including but not limited to his costs associated with the Respondent's malicious prosecution of their indemnity claims in the 92 Arbitration."

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No 00-1147

SIGNATOR INVESTORS
v
THOMAS W OLICK
APPELLANT

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No. 99-cv-04854)
District Judge: Hon. James T. Giles

Submitted Under Third Circuit LAR 34.1(a)
August 22, 2001

Before: SLOVITZ, ROTH AND COWEN
Circuit Judges

(Filed: August 28, 2001)

OPINION

PER CURIAM

Thomas W Olick appeals from the District Court's order granting Signator Investors Inc. for a permanent injunction enjoining him from prosecuting National Association of Securities Dealers Arbitration No. 99-3353 and from pursing any of the claims asserted in his 1999 Statement of Claims to the NASD.

I

The present case is part if a continuing dispute between Olick and Signator, formerly known as John Hancock Distributors Inc. following Olick's termination by Hancock in 1991. After we remanded the case in John Hancock Mut. Life Ins. Co. v Olick, 151 F3d 132 (3rd Cir 1998), the District Court granted Hancock's motion for summary judgment, finding that the tort claims asserted by Olick were barred by res judicata because they had been rejected by the District Court as untimely and meritless in a previous case, Carroll v Hancock et al Civ No. 92-5907 (E.D. Pa 1995). We affirmed, John Hancock Distributors Inc v Olick C.A., Nos 9802178 and 99-1123 (3rd Cir September 10, 1999) (per curiam) ("Hancock II"), rehearing and rehearing en banc denied.

Meanwhile, Olick filed the 1999 Statement of Claims, asserting claims for defamation, malicious prosecution, concealment of evidence and violations of NASD regulations. Signator then brought the present action seeking to enjoin Olick from pursuing that arbitration, arguing that Olick's claims were res judicata. The District Court held a hearing, granting preliminary injunctive relief and, after allowing the parties to respond, issued an order granting permanent injunctive relief.

The District Court found that equity jurisdiction was proper because, absent a proper injunction, Signator would be required to answer and defend against the arbitration of legally barred claims. Signator would be deprived of its right to be free of the cost and vexation of

multiple lawsuits and of its right to rely on the prior final adjudication of Olick's claims against it in Carroll. These are real injuries which have no remedy at law. Nor has Olick raised equitable bars to the relief sought. Moreover, the balance of equities in favor of granting permanent injunctive relief; not only does Olick have no right to arbitrate claims in derogation of prior federal court decisions, but Signator has a legal right not to be subject to arbitration of claims that were or could have been brought in Carroll and are this barred. Moreover, the public interest is served by preserving judicial resources, avoiding inconsistent legal decisions and promoting finality and reliability of, and respect for, the court decisions.

Finally, the court found that Signator succeeded on the merits of its claims, i.e. that all of the claims in Olick's 1999 Statement were litigated or could have been litigated in Carroll and are thus barred by res judicata. The court noted that in Hancock II we affirmed the District Court's previous finding that Olick's claims were barred by res judicata and rejected Olick's argument that his 1996 Statement of Claims contained new claims that could not be so barred, finding that it contained no such claims. The court concluded that while Olick's 1999 Statement of Claims attempted to remedy this by explicitly pleading defamation on statement made since April 1996, he nevertheless failed to state new claims, so that his claims remained barred by res judicata. The 1999 statement focuses on ten amended U-5 forms, all filed in or

after April 1996, which Olick contends are new publications of defamatory statements. The District Court found that the forms were amended U-5s published at Olick's request to reflect the resolution of certain customer complaints and, as such, contain nothing new besides representations by Signator concerning the outcomes of arbitrations or internal investigations and the payment of money to customers to resolve complaints; and these representations do not constitute defamation. To the extent that Olick is mentioned on those amended forms, it is in the same manner and context in which he was mentioned in some of the original U-5s which were the subject of Carroll and previously found to be res judicata.

Olick also argues that he has stated a new claim that Signator violated NASD regulations in the 1999 by failing to amend other U-5s to reflect the withdrawal of certain complaints pursuant to a settlement between those customers and Olick. The District Court found that because Olick did not plead that any of these customers did in fact withdraw their complaints, the 1999 Statement does not sufficiently allege that Signator's duty to amend the U-5s under the NASD rues was triggered and this had not stated a new cause of action to avoid claim preclusion. Even if, as Olick claims, these customer were bound by an order of the Bankruptcy Court to withdraw their complaints, Olick has not alleged or shown that they did so.

Finally, Olick attempted to plead a claim for malicious prosecution based on certain indemnification claims brought but rejected in Olick's bankruptcy case;

concedes that this claim may already be adjudicated. The District Court did not address this claim in its order granting permanent injunctive relief but in its earlier order granting a preliminary injunction found that these claims were or should have been brought through the bankruptcy proceedings and are thus barred.

II

We agree with the District Court's reasons for granting Signator motion for a permanent injunction as far as they go and shall affirm the judgment to that extent. However, in his brief Olick complains that Hancock intentionally withheld or concealed material evidence in NASD 92-04070. Signator responds that the reason why the court ignored this claim is that it cannot be found in the 1999 Statement. Moreover, "(i)t is highly questionable whether such a `claim' exists. Most jurisdictions, including Pennsylvania, do not recognize a separate tort action for concealment or of intentional spoilage of evidence when a party to the litigation is the one alleged to have engaged in the concealment/spoilage." Brief at 19 n.4.

However, as Olick points out in his reply brief, the claims is indeed in his 1999 Statement, at @@ 131-138, where he states that in a 1992 arbitration he sought punitive damages, and sought and was awarded damages for fraud and intentional misrepresentation. He also states that the arbitration panel ordered the respondents to produce all documents relating to the limited partnerships which were the subject of the compliant, to which the respondent responded by

claiming that all file had been destroyed during the normal course of business. Olick claims, however, that in 1998 in the course of a 1996 arbitration proceeding, the respondent produced certain of these allegedly destroyed materials, including an admission that the general partner of two partnerships at issue in the 1992 arbitration was insolvent and that the respondent had advised it personnel to conceal this and other adverse information from its agents and clients. According to Olick, if he had known this information it would have "materially increased the award and/or punitive damages that (he) could have been awarded." 1999 Statement at @ 136.

It is true, as Signator states, that Pennsylvania appears not to have adopted a separate tort action for concealment or destruction of evidence. On the other hand, it has not expressly rejected it in a holding. Rather, in the case cited by Signator, the Superior Court stated: "We decline to express a specific view on whether a separate tort is needed where an adverse party to litigation spoils evidence, since the issue is not presently before this court." Elias v Lancaster General Hospital 710 A 2d 65, 67 (Pa Super 1998). The court went on to note that it perceived no need for such a tort because traditional remedies and sanctions were sufficient. This seems to be the general rule. See Intentional Spoilage of Evidence, Interfering with Prospective Civil Action, as Actionable, 70 ALR 4th 984 (1989, 2000 Supp). We note, however, that even if Olick's claims relief on a intentional tort of spoilage of evidence (this is unclear), traditional remedies and sanctions are

unlikely to be effective where the evidence of spoilage is not discovered until after the underlying action has ended. For these reasons, based on the record before us we are unwilling to conclude that this claim is certain to fail and, thus, should be included within the scope of the District Court's Injunction. Accordingly, we shall remand the matter to the District Court for further proceedings with regard to this claim only. We otherwise express no opinion on the merit of this claims or whether its pursuit should be enjoined.